No. 3105

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Northern District of California, Second Division.

No. 253—IN EQUITY.

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Plaintiffs,

vs.

DAVID ISAACS,

Defendant.

First Amended Bill of Complaint.

To the Honorable the Judges of the District Court of the United States in and for the Northern District of California, Second Division, in Chancery Sitting:

American Central Insurance Company, a citizen of the State of Missouri, in the United States of America, National Fire Insurance Company of Hartford, a citizen of the State of Connecticut, in the United States of America, Insurance Company of North America, a citizen of the State of Pennsylvania, in the United States of America, National Union Fire Insurance Company of Pittsburg, Pa., a citizen of the State of Pennsylvania, in the United States of America, and Security Insurance Company of New Haven, a citizen of the State of Connecticut, in the

United States of America, bring this their bill of complaint against David Isaacs, a citizen of the State of California and of the Northern District of the State of California:

And thereupon complainants allege:

I.

That American Central Insurance Company is a corporation created by and existing under and by virtue of the laws of the State of Missouri; that National Fire Insurance Company of Hartford [1*] is a corporation created by and existing under and by virtue of the laws of the State of Connecticut; that Insurance Company of North America is a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania; that National Union Fire Insurance Company of Pittsburg, Pa., is a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania; that Security Insurance Company of New Haven is a corporation created by and existing under and by virtue of the laws of the State of Connecticut; and were each and all such corporations during all the times hereinafter mentioned.

That David Isaacs, the defendant, is a citizen and inhabitant of the State of California and of the Northern District of California, in the United States of America.

That the amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000, and there exists to your complainants no plain, adequate and complete remedy at law.

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*Page-number appearing at foot of page of original certified Transcript of Record.

II.

That your complainants are and at all the times hereinafter mentioned were fire insurance companies carrying on business individually and through underwriters in the State of Washington in the United States of America; and on or about the 11th day of August, 1913, were insurers as aforesaid in various proportional amounts of the stock of merchandise of A. Bridge in the store of A. Bridge & Co., in the city of Seattle in the said State of Washington. That on or about said date a fire occurred in the said store and merchandise causing a loss. That the assignee for said Bridge and complainants, his insurers, could not agree upon the amount of damage. That the said Bridge stock of merchandise was inventoried at some $48,000.00, and after negotiations between your complainants and the assignee of said assured the sound value of the said stock of said Bridge remaining after said fire was fixed at $34,300.00, as a compromise between your complainants and the assignee of said Bridge, and your complainants for said amount purchased the whole of said stock of merchandise [2] from the assignee of said Bridge, their assured. That the defendant contracted with your complainants to dispose of this their stock of merchandise for them, offering to advance them a guarantee of $18,100.00, in cash and to take over from them as their trustee their said merchandise in its entirety and to sell and dispose of the same for them to the best possible advantage and to return to them any and all monies taken in by him for them on such sale over and above his said

guarantee and actual expenses. That the complainants accepted defendant's said offer and delivered over their said stock of merchandise into his hands to do his best for them on the terms and conditions aforesaid. That the defendant after thus contracting with the complainants did actually take over into his exclusive and sole possession and control their said stock of merchandise and as their said trustee and upon the terms and conditions mentioned above proceeded to sell the same in the said city of Seattle and State of Washington, and sold all of your complainants' said stock of merchandise therein; but, as your complainants are informed and believe and therefore allege the fact to be, said defendant, their trustee, did not return to them the monies taken in by him for them on such sale over and above his said guarantee and actual expenses but has retained in his possession sums of monies belonging to your complainants the amounts of which they are unable to state and which cannot be ascertained without the accounting herein prayed.

III.

That following said sale and on or about the 26th day of November, 1913, this defendant rendered a statement to your complainants of his said operations as their trustee, as follows:

"STATEMENT—SALVAGE OF A. BRIDGE & CO.

Clothing, furnishing, shoes, net sales			$28,901.92
Expense:			
Rent	$ 920.00		
Light	66.88		
Advertising	1204.21		
Clerk Hire	1655.21		
Materials	90.84	[3]	
Insurance	34.59		
Commmission for handling at 20% on $28.901.92	5780.38		
Advance of guarantee	18100.00		
	$27852.11		27,852.11
Net proceeds			$1,049.81"

and the said purported "net proceeds" were paid over to your complainants, who at the time believed and had no other knowledge nor had information of any kind to put them on inquiry, to question the said statement or good faith of their trustee, this defendant. That your complainants are informed and believe and therefore charge the fact to be that said statement did not constitute a full accouning by said defendant as their trustee and that the expense items of said statement are excessive and likewise with the totals false and untrue; and your complainants ask discovery of your Honors of the entire true expenditures and receipts of said sale.

IV.

That since the rendition of the statement aforesaid

and the payment of the said $1,049.81, purported "net proceeds" therein, a suit was begun in this court against this defendant Isaacs, as Equity Case 83, entitled Harry C. Seynei, Plaintiff, vs. David Isaacs, Defendant, to establish a partnership in a portion of this same said Bridge stock of merchandise after the sale by the defendant for your complainants' account, and for an accounting; the cause after hearings had over a period of some year and a half having been brought to a conclusion upon the 9th day of February, 1916. That upon the said hearings evidence was given under oath by the defendant's partner who managed the entire sale at Seattle conducted by this defendant Isaacs for your complainants' account, that sums in cash were received by said Isaacs upon the said sale for the account of these insurance companies, your complainants, largely in excess of the said sum of $28,901.92, which this defendant claimed in his above statement to be the total of his receipts; [4]

That this knowledge of the fact of such evidence and of the facts themselves aforesaid has only come of recent date to your complainants and were not discovered or made known to them before ten days prior to the filing of this their bill of complaint. That your complainants reside in other states than that of Washington and had no personal knowledge of the facts herein set forth and your complainants trusted and believed the said representations of their trustee this defendant and did not before the time above-mentioned discover any of the facts as to the falsity of his said statement to them of said sale until

so apprised of the said evidence and of the facts so referred to under oath in said cause 83.

Your complainants therefore expressly charge and aver that they relied upon and were misled by the said false representations of his expenditures and receipts made at said time to them by their said trustee through his said statement; and that your complainants in ignorance of their falsity accepted as true and as made to them in good faith the said misrepresentations of facts therein contained. That thereafter the fact of the falsity of the said statement rendered them by their said trustee and the fact of the existence of monies so withheld by him from them has been sedulously and fraudulently concealed by him, said defendant, to the present time.

Your complainants therefore allege and charge the fact to be that said defendant sold the said Bridge stock of merchandise belonging to your complainants at a large advance beyond the said sum of $28,901.92, the amount of excess thereover being unknown to your complainants and of which they ask discovery and an accounting from said defendant. [5]

V.

And your complainants further show that before the filing of this their bill of complaint, and as late as the very day of the filing of said bill, they have applied to the said defendant, David Isaacs, and requested him to come to a full and fair account in respect to all the said transactions of said entire sale of their stock of merchandise in Seattle; with which just and reasonable request complainants well hoped that said defendant would have complied, as in jus-

tice and equity he should have done; but that defendant has flatly refused said request.

VI.

That said defendant during all the times mentioned herein occupied a position of peculiar trust and confidence towards your complainants, a fiduciary relation requiring the utmost good faith as their trustee. That he had in his exclusive possession and control their said Bridge stock of merchandise which had been inventoried at some $48,000 and for which they had paid the assignee of the assured $34,300 in cash. That your complainants were at a distance, citizens of other states than the State of Washington and had to rely upon the good faith of this defendant as their trustee. That now, with their knowledge just acquired of the incorrectness and falsity of the said account rendered and purported balance paid to them, they bring this their bill before your Honors in Chancery and ask a full and explicit account from their trustee, this defendant, of their said merchandise sold and disposed of by him; and that he be held to account and pay over to your complainants in the various proportional amounts respectively as they shall each be found entitled. Your complainants charge that if the said accounts between them and this defendent are properly taken and a just and true settlement had of the same it will appear that a considerable balance is due from this defendant to your complainants, the amount of which they are unable to ascertain without such accounting and [6] except in a Court of Equity.

VII.

That your complainants by reason of the attitude of the defendant in refusing them a full and fair account of his operations as their trustee, have been compelled to employ counsel to bring this suit and have become indebted through their said employment of counsel in a sum which will depend upon the future character of the litigation.

WHEREFORE COMPLAINANTS PRAY:

That an account may be taken of all sums of money received by or come to the hands of the defendant upon his said sale of the said Bridge stock of merchandise, for, on account of, and for the use of the complainants, and of all dealings and transactions of the defendant as such trustee; and that the defendant may be ordered to pay to the complainants what, on taking such account, shall be found to be due from defendant to complainants.

That the defendant may be compelled to set forth an account of all and every sum and sums of money received by him or by any person or persons by his order, or for his use, for or in respect to your complainants' said Bridge stock of merchandise, from the time it came into his hands to the present time, and when and from whom and from what in particular all and every such sums were respectively received, and how the same respectively have been applied and disposed of.

That the defendant may answer the premises and that the expenses and counsel fees of complainants in this litigation may be charged and determined and that payment thereof by this defendant be decreed

by this Court, and that said defendant pay the costs of this suit.

And for such other and further relief as your Honors may at any time find meet and equitable.

JESSE OLNEY,

Solicitor and Counsel for Complainants. [7]

United States of America,
Northern District of California,—ss.

Jesse Olney, being duly sworn, deposes and says:

I am the solicitor and counsel for the complainants in the foregoing First Amended Bill of Complaint.

I have read the said First Amended Bill of Complaint and know the contents thereof, and that the same is true of my own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is not made by one of the complainants is that said complainants are all citizens of other states than the State of California and not within the Northern District of California wherein my office is situated; and for the further reason that the allegations of said bill of complaint are more within my own knowledge than of the officers of any of the said corporations complainant.

JESSE OLNEY.

Subscribed and sworn to before me, this 4th day of May, 1916.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed May 4, 1916. Walter B. Maling, Clerk. [8]

(Title of Court and Cause.)

Answer to First Amended Bill of Complaint.

Now comes David Isaacs, the defendant in the above-entitled action, and hereby makes answer to plaintiffs' First Amended Bill of Complaint, and, for answer thereof, denies, admits and alleges, as follows:

I.

Denies that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand (3,000) Dollars, or any other sum, and there exists to your complainants no plain, adequate and complete remedy at law; or that the amount in controversy herein exceeds, exclusive of interest or costs, the sum of Three Thousand (3,000) Dollars, or any other sum, or there exists to your complainants no plain, adequate or complete remedy at law.

II.

Denies that said Bridge stock was inventoried at some Forty-eight Thousand (48,000) Dollars, or any other sum more than Forty-five Thousand Nine Hundred and Fifty-four (45,954) Dollars, and after negotiations between your complainants and the assignee of said assured the sound, or any, value of the said stock of said Bridge remaining after said fire was fixed at Thirty-four Thousand Three Hundred (34,300) Dollars, or any other sum, as a compromise

between your complainants and the assignee of said Bridge, and in this behalf said defendant alleges:

That after negotiations between complainants and the assignee of said assured, the sound value of said stock of said Bridge before said fire was fixed at Thirty-four Thousand Three Hundred (34,300) Dollars. [9]

III.

Denies that said defendant did not return to complainants all of the monies taken in by him for them, or either of them, on such or any sale, over and above his said guarantee and actual expenses, but has retained in his possession sums of monies belonging to complainants, or either of them, the amounts of which they, or either of them, are unable to state and which cannot be ascertained without the, or any, accounting herein prayed; or that said defendant did not return to complainants all of the monies taken in by him for them, or either of them, on such, or any, sale over or above his said guarantee or actual expenses, but has retained in his possession sums of monies belonging to complainants, or either of them, the amounts of which they, or either of them, are unable to state or which cannot be ascertained without the, or any, accounting herein prayed.

IV.

Denies that at the time said net proceeds were paid over to complainants by defendant, complainants had no other knowledge nor had information of any kind to put them on inquiry, to question the said statement or good faith of their trustee, this defendant, and in this behalf said defendant alleges:

That at the time of the rendition of said statement set forth in the Third Allegation of complainants' said amended bill, said complainants and each of them had full and complete information concerning all the matters, items and things alleged and contained in said statement.

Denies that said statement did not constitute a full accounting by said defendant, as their trustee, and that the expense items of said statement are excessive and likewise, or at all, with the totals, false and untrue; or that said statement did not constitute a full accounting by said defendant, as their trustee, or that the expense items of said statement are excessive or likewise, or at all, [10] with the totals, false or untrue.

V.

That defendant has no information upon the subject sufficient to enable him to answer Allegation IV of said amended bill, and placing his denial upon that ground denies that upon the said, or any, hearings evidence was given under oath by the defendant's partner who managed the entire, or any, sale at Seattle, or any other place, conducted by this defendant for complainants' account, that sums in cash were received by defendant upon the said or any, sale for the account of complainants, or either of them, largely, or at all, in excess of said sum of Twenty-eight Thousand Nine Hundred and One and 92/100 (28,901.92) Dollars; that if any such evidence was given by said partner the same was and is untrue and false.

VI.

Denies that said complainants, or either of them, relied upon and were misled by the said false, or any, representations of defendant's expenditures and receipts made at said or any time to them, or either of them, by defendant through his said, or any, statement, and that complainants, or either of them, in ignorance of their falsity accepted as true and as made to them, or either of them, in good faith the said misrepresentations of the facts therein contained; or that said complainants, or either of them, relied upon or were misled by the said false, or any, representations of defendant's expenditures or receipts made at said or any time to them or either of them by defendant through his said or any statement, or that complainants or either of them, in ignorance of their falsity accepted as true or as made to them or either of them, in good faith the said misrepresentations of the facts therein contained.

Denies that thereafter, or any other time, the fact of the falsity of the said, or any statement rendered to complainants or either of them by their said trustee, and the fact of the existence [11] of monies so, or at all, withheld by him from them, or either of them, has been sedulously and fraudulently, or at all, concealed by him, said defendant, to the present time, or any other time, or at all; or that thereafter, or any other time, the fact of the falsity of the said, or any, statement rendered to complainants, or either of them, by their said trustee, or the fact of the existence of monies so, or at all, withheld by him from them, or either of them, has been sedulously or fraud-

ulently or at all, concealed by him, said defendant, to the present time, or any other time, or at all.

Denies that the defendant sold the said Bridge stock of merchandise belonging to complainants at a large, or any, advance beyond the said sum of Twenty-eight Thousand Nine Hundred and One and 92/100 (28,901.92) Dollars, or for any sum greater than said sum of $28,901.92.

VII.

Denies that at any time before the filing of complainants' Bill of Complaint, and as late as the very day of the filing of said bill, complainants, or either of them, applied to said defendant and requested him to come to a full and fair, or other, account in respect to all or any of said transactions of said entire, or any, sale of their stock of merchandise in Seattle or any other place; with which just and reasonable, or any, request complainants or either of them well, or at all, hoped that said defendant would have complied, as in justice and equity he should have done but that defendant has flatly or at all refused said or any request; or that at any time before the filing of Complainants' Bill of Complaint or as late as the very day of the filing of said bill, complainants, or either of them, applied to said defendant or requested him to come to a full or fair, or other, account in respect to all or any of said transactions of said entire, or any, [12] sale of their stock of merchandise in Seattle or any other place; with which just or reasonable or any request, complainants or either of them well, or at all, hoped that said defendant would have complied, as in justice

or equity he should have done; but that defendant has flatly or at all refused said, or any, request, and in this behalf said defendant alleges:

That on the 23d day of February, 1916, complainants, through their attorney and solicitor, called upon defendant in the city and county of San Francisco, State of California, and demanded from defendant that he pay to him for complainants the amount of money due by said defendant to said complainants, and that at said time, defendant informed said attorney and solicitor that he was not indebted to said complainants in any sum or sums on account of his connection with the sale of said Bridge stock.

VIII.

Admits that defendant had in his exclusive possession and control said Bridge stock merchandise, but denies that the same had been inventoried for more than Forty-five Thousand Nine Hundred and Fifty-four (45,954) Dollars; admits that complainants paid the assignee for the assured Thirty-four Thousand Three Hundred (34,300) Dollars in cash, but, in this behalf, alleges:

That Eighteen Thousand One Hundred (18,100) Dollars of said amount was received from defendant on account of his employment with complainants.

Denies that if the said accounts between complainants and defendant are properly or at all taken, and a just and true or any settlement had of the same, it will appear that a considerable, or any, balance is due from this defendant to your complainants, or either of them; or that if the said accounts between complainants and defendant are properly, or at all,

taken or a full or true, or any, settlement had of the same, it will appear that a considerable, or any, balance is due from this defendant to your complainants, or either of them. [13]

IX.

Denies that by reason of the attitude of the defendant in refusing complainants, or either of them, a full and fair, or any, account of his operations as their trustee, complainants or either of them, have been compelled to employ counsel to bring this suit, and have become indebted through their said, or any, employment of counsel in a sum which will depend upon the future character of the litigation; or that by reason of the attitude of the defendant in refusing complainants, or either of them, a full or fair, or any, account of his operations as their trustee, complainants or either of them have been compelled to employ counsel to bring this suit, or have become indebted through their said or any employment of counsel in a sum which will depend upon the future character of the litigation, and, in this behalf, defendant alleges:

That defendant believes and expressly charges and avers that before the filing of complainants' bill in the above-entitled matter, Jesse Olney sought out complainants, informing them that he had been successful in obtaining a judgment against defendant in the said action of "Seynei v. Isaacs," and that if said Isaacs were compelled to account to complainants for the moneys received by him, on account of said sale of said "Bridge" stock, it would be found and ascertained that said Isaacs is indebted to said

complainants on account of his employment with complainants in the sale of said stock; and defendant further believes and charges and avers the fact to be, that Jesse Olney at said time agreed with complainants that if they would permit him to act as their attorney in an action to be brought against defendant for said accounting, said Olney would accept said employment on a contingent fee, the amount thereof to be paid solely in the event that said Olney is successful in obtaining a judgment against said Isaacs; that with said understanding, complainants employed said Olney as their attorney in the above-entitled matter. [14]

FOR A FURTHER, SEPARATE AND DISTINCT ANSWER AND DEFENSE TO COMPLAINANTS' SAID BILL, DEFENDANT ALLEGES:

I.

That on or about the 11th day of August, 1913, a fire occurred in the store of A. Bridge & Co., in the city of Seattle, State of Washington, damaging its stock of merchandise; that said stock of merchandise was insured by complainants, in proportional amounts, aggregating Twenty-one Thousand (21,000) Dollars.

That for the purpose of arriving at the sound value of said merchandise before said fire, immediately thereafter said A. Bridge & Co. prepared an inventory of the stock of merchandise covered by said insurance, and claimed to have been in said premises before and at the time of the said fire; that after negotiations between complainants and said

assignee of said A. Bridge & Co., the sound value of said stock of merchandise before and at the time of the fire, was fixed at Thirty-four Thousand Three Hundred (34,300) Dollars; that the amount of said damage to said stock of merchandise by reason of said fire, was fixed by complainants at the sum of Sixteen Thousand Two Hundred (16,200) Dollars; that the said assignee of said A. Bridge & Co. refused to accept said sum of Sixteen Thousand Two Hundred (16,200) Dollars, as the amount of and in full payment of said damage, claiming some Twenty Thousand (20,000) Dollars as the amount of said damage.

That after receiving from defendant a guarantee that the sale of said merchandise, remaining after said fire, would amount to the sum of Eighteen Thousand One Hundred (18,100) Dollars net to complainants, complainants took over for their own use and benefit said merchandise of said A. Bridge & Co. remaining after said fire, and paid to the assignee of A. Bridge & Co. Thirty-four [15] Thousand Three Hundred (34,300) Dollars (the same being the said sound value of said stock of merchandise before said fire) as follows:

Eighteen Thousand One Hundred (18,100) Dollars received from defendant on account of said guaranty, and

Sixteen Thousand Two Hundred (16,200) Dollars contributed by said complainants.

II.

That said guaranty and payment of Eighteen Thousand One Hundred (18,100) Dollars on the part

of defendant was made upon the express understanding and agreement that complainants engage and employ defendant to sell said remaining stock of merchandise; for which said services complainants agreed to pay to defendant Twenty Per Cent (20%) of all sums realized by him on account of said sale, as also all expenses and costs of maintaining, incident to, and in the sale of said merchandise.

III.

That defendant thereupon undertook the sale of said merchandise and sold the whole thereof for the sum of Twenty-eight Thousand Nine Hundred and One and 92/100 (28,901.92) Dollars; that after deducting the expenses incident to and of said sale, the amount of said commission, and the amount of said guaranty advanced by defendant and paid to the assignee of said A. Bridge & Co., as aforesaid, amounting in all to the sum of Twenty-seven Thousand Eight Hundred and Fifty-two and 11/100 (27,852.11) Dollars, on the 26th day of November, 1913, defendant paid over to complainants the balance received on account of said sales, to wit, the sum of One Thousand and Forty-nine and 81/100 (1,049.81) Dollars.

IV.

That said sum of Twenty-eight Thousand Nine Hundred and One and 92/100 Dollars represented and was all the moneys that defendant received on account of said sale of said merchandise and that said sum of Twenty-seven Thousand Eight Hundred and Fifty-two and 11/100 (27,852.11) Dollars represented and was all of the costs of, incident to, and

in the sale of said merchandise, including [16] said commission and said guaranty aforesaid, and actually paid by defendant in the sale thereof.

FOR A FURTHER, SEPARATE AND DISTINCT ANSWER AND DEFENSE TO COMPLAINANTS' SAID BILL, DEFENDANT ALLEGES:

I.

That in the latter part of August, 1913, complainants employed defendant to sell for them a certain stock of merchandise, in the city of Seattle, State of Washington.

II.

That thereupon defendant entered into his said employment and sold said merchandise, and that on the 26th day of November, 1913, defendant rendered to complainants a full, true and complete statement on all of the sales made by him under said employment, and on said last-mentioned day, defendant paid to complainants all moneys received by him on account of said sales, less the actual costs and expenses incurred and expended in said sale under said employment.

III.

That at the time of rendering said statement and paying said moneys, complainants had full and complete knowledge and information concerning all of the matters and things contained in said statement, and that said complainants accepted said statement and moneys in full settlement of all of said matters and things referred to and contained in said statement.

FOR A FURTHER, SEPARATE AND DISTINCT ANSWER AND DEFENSE TO COMPLAINANTS' SAID BILL, SAID DEFENDANT ALLEGES:

That complainants are guilty of laches and unreasonable delay in the institution of the above-entitled action, and, in this behalf, said defendant alleges:

That complainants were informed and had full information of all of the matters and things contained in said statement referred [17] to in the Third Allegation of said bill, at the time of the rendition thereof; and that, before the institution of said suit of Harry C. Seynei against this defendant, referred to in the Fourth Allegation of complainants' said bill, defendant offered to check with complainants and requested complainants to check with defendant the entire account of sales made by defendant for complainants, as also the costs and expenses connected with, incident to, and of said sale, but that said complainants refused to so check said account.

WHEREFORE, defendant prays that complainants take nothing by their said bill; that said bill be dismissed and that defendant have judgment against complainants, and each of them, for his costs of suit; that defendant recover the amount of his attorney fees incurred in the defense of said action, and that defendant have such other and further relief as may be meet and equitable.

LEON E. PRESCOTT,
No. 378, Russ Building,
San Francisco, California,
Solicitor for Defendant.

State of California,
City and County of San Francisco,—ss.

David Isaacs, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

DAVID ISAACS.

Subscribed and sworn to before me this 15th day of June, 1916.

[Seal] MARY L. THOMAS,
Notary Public in and for the City and County of San Francisco, State of California. [18]

[Endorsed]: Filed Jun. 15, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

Minutes of Court—January 30, 1917—Order Permitting Plaintiffs to File an Amendment to Bill of Complaint.

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 30th day of January, in

the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 253—EQUITY.

AMERICAN CENTRAL INS. CO. et al.

vs.

DAVID ISAACS.

(Order Permitting Plaintiffs to File an Amendment, etc.)

Ordered that plaintiffs may file an amendment to the amended bill of complaint. [20]

Minutes of Court—January 31, 1917—Order Granting Defendant Ten Days to Plead to Amended Bill of Complaint.

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 31st day of January, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 253—EQUITY.

AMERICAN CENTRAL INS. CO.

vs.

DAVID ISAACS.

(**Order Amending First Amended Bill of Complaint.**)

Plaintiffs presented and filed their amendment to the First Amended Bill of Complaint. Upon motion of Mr. Olney, it was ordered that said amendment be amended by striking therefrom the following, namely: On page 2, line 13, beginning with the words "that the said sale," etc., and including the remainder of that paragraph. Ordered that the defendant may have ten days within which to plead to said amended bill. [21]

(Title of Court and Cause.)

Amendment to First Amended Bill of Complaint.

Now come the complainants in the above-entitled cause and by leave of the Court amend their first amended bill of complaint, as follows: after the words "said sale" on line eight of page five thereof, insert new paragraphs as below:

The complainants further charge and show to your Honors that this defendant, their trustee, sold in bulk secretly to himself without their knowledge or consent the balance of their said stock of merchandise remaining after only three weeks of his said sale for them in the city of the Seattle, State of Washington. That knowledge of said sale to himself was

not communicated to your complainants at any time by said defendant, and that they only became aware of the same within ten days prior to the commencement of this action. That said defendant thus sold secretly to himself between one-half and two-thirds of their entire said merchandise, the exact amount of which they are unable to state and ask discovery by this Court. That said alleged sale to himself was accomplished by only one day's notice to the public by means of a small advertisement in a newspaper which said time and notice were grossly inadequate to obtain competitive bids. That in fact as your complainants are informed and believe and therefore charge the fact to be, that this defendant, their trustee, thus transferred to himself their said trust fund consisting of their said merchandise, without *bona fide* competitive bids therefor of any kind or nature whatever; and that upon said sale to himself clandestinely of their merchandise he credited himself and withheld from them upon his said final statement and settlement a sum amounting to 20% of his claimed consideration paid therefor, claiming the same unbeknown to them as commissions upon his own purchase. That said defendant was not entitled to said or any commissions [22] upon his said clandestine appropriation of their merchandise, and they ask and pray a return to them of said moneys so withheld in such sum as the Court shall find due.

* * * * * * * * *

That said transfer to himself by their trustee was a gross fraud and imposition upon your complain-

ants who ask that said transfer be set aside and that their said trustee be charged with the full value of said trust fund, together with his profits thereon additional in such sum as the Court shall find due upon the accounting herein prayed, together with legal interest thereon from time of said sale.

JESSE OLNEY,
Solicitor and Counsel for Complainants.

United States of America,
Northern District of California,—ss.

Jesse Olney, being duly sworn, deposes and says:

I am the solicitor and counsel for the complainants in the foregoing Amendment to the First Amended Complaint.

I have read the Amendment to the First Amended Bill of Complaint and know the contents thereof, and that the same is true of my own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is not made by one of the complainants is that said complainants are all citizens of other states than the State of California and not within the Northern District of California wherein my office is situated; and for the further reason that the allegations of said Amendment to the First Amended Bill of Complaint are more within my own knowledge [23] than of the officers of the said corporations complainant.

JESSE OLNEY.

Subscribed and sworn to before me this 31st day of January, 1917.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Jan'y 31, 1917. Walter B. Maling, Clerk. [24]

(Title of Court and Cause.)

Answer to Amendment of First Amended Bill of Complaint.

Now comes the defendant, and for answer to the amendment of the first amended bill of complaint of plaintiffs on file herein, denies, that this defendant, trustee of said plaintiffs, sold in bulk secretly to himself, without their knowledge or consent, the balance of their said stock of merchandise remaining after only three weeks' of said sale, in the city of Seattle, State of Washington; but, on the contrary, this defendant alleges that said stock of merchandise was sold in bulk to himself with the full knowledge and consent of the said plaintiffs, and that an account of said sale was rendered to them at or about the time said sale was made, and that said plaintiffs had full knowledge of the fact that said sale had been made to defendant, and had such knowledge for more than three years prior to the filing of said amendment, and that said plaintiffs made no objections thereto.

Further answering said amendment, defendant denies that knowledge of said sale to himself was not

communicated to said plaintiffs at any time by said defendant; and denies that said plaintiffs only became aware of the same within ten days prior to the commencement of this action; and in this behalf defendant avers that the plaintiffs, and their agents and representatives knew of said sale on the 26th day of November, 1913; that said sale was made to said defendant with the full knowledge and consent of said plaintiffs, and the matter of said sale to said defendant was discussed with said plaintiffs prior to the making thereof.

Further answering said amendment that said defendant sold secretly to himself between one-half and two-thirds of the entire stock of merchandise, defendant denies the same and alleges that [25] all of the merchandise purchased by defendant was sold to himself with the full knowledge of said plaintiffs, and with their consent, and plaintiffs made no objection thereto until the 31st day of January, 1917, the date on which said amendment to said first amended bill of complaint was filed.

Further answering said amendment, defendant denies that the sale to defendant was accomplished without sufficient notice, or that the time and notice were grossly inadequate to obtain competitive bids; but, on the contrary, defendant avers the fact to be that there were competitive bids of *bona fide* bidders, and that defendant's was the highest bid therefor, the lowest bid being in the neighborhood of $4,000.00; and defendant alleges that for more than three years last past the plaintiffs had full knowledge of said bidding, the manner of obtaining the bids and the

time of notice, and that said plaintiffs made no objection thereto; but on the contrary plaintiffs received the amount of defendant's bid on the 28th day of November, 1913, and have retained defendant's money and have not returned the same or offered to return the same.

Further answering said amendment defendant denies that defendant credited himself and withheld from the plaintiffs in his final statement and settlement, a sum amounting to twenty per cent of his claimed consideration paid therefor, claiming the same, unbeknown to said plaintiffs, was commission on his own purchase, and denies that said defendant was not entitled to said or any commissions for said purchase of his merchandise; and in this behalf defendant admits that he credited himself in his final statement rendered on the 26th day of November, 1913, with the amounts of said commissions; that he did openly claim to be entitled thereto; that his claim therefor was known to the plaintiffs and was allowed; that plaintiffs made no objection thereto of any kind or character, until the 31st day of January, 1917, [26] although they had full knowledge thereof for more than three years prior to that time.

For a further and separate defense, defendant avers that on the 26th day of November, 1913, an account was stated between the defendant and plaintiffs with respect to the transactions set out in the first amended bill and the amendment thereto; that on said date the plaintiffs and defendant came to an accounting together; that on such accounting defendant was found to be indebted to plaintiffs in the spe-

cified sum of $1,049.81; that defendant paid the same to said plaintiffs, and that plaintiffs accepted the same and received their proportions thereof; that said account is set out in the amended bill of complaint herein, and that plaintiffs have kept said account for more than two and a half years without making any objections thereto, and particularly with respect to the item of commissions complained of in plaintiffs' said amendment to the bill, no objection was made to said item until the filing of said amendment, to wit, on the 31st day of January, 1917.

Further answering said amendment defendant avers that said amendment does not state any matter of equity entitling plaintiffs to the relief prayed for; that said amendment introduces a new cause of action; that there is no averment in said amendment why the knowledge of plaintiffs therein referred to was not obtained earlier; that no acts of diligence on the part of plaintiffs are therein shown; it appears upon the face of said amendment that the plaintiffs were and are guilty of laches; there is no averment excusing the delays on the part of plaintiffs, or showing the fraudulent concealment of any facts from plaintiffs, and no allegation showing why the alleged fraud was not discovered sooner, and there is no averment showing that by the exercise of ordinary diligence the discovery might not have been sooner made.

For a further and separate defense defendant alleges that [27] the alleged cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of

California; that said alleged cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California.

WHEREFORE, defendant having fully answered, prays that said bill and the amendment to said bill, be dismissed.

LEON PRESCOTT,
BERT SCHLESINGER,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

David Isaacs, being first duly sworn, deposes and says: That he is the defendant named in the foregoing answer; that he has read said answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

DAVID ISAACS.

Subscribed and sworn to before me this 8th day of February, 1917.

[Seal] H. B. DENSON,
Notary Public in and for the City and County of San Francisco, State of California. [28]

Receipt of a copy of the within Answer to Amendment of First Amended Bill of Complaint is hereby admitted this 8th day of February, 1917.

JESSE OLNEY,
Atty. for Complainants.

[Endorsed]: Filed Feb. 7, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(The amendment to the First Amended Complaint was filed by leave of Court during the course of the trial on the 31st day of January, 1917, and was not included in Complainants' Original Bill filed February 23, 1916, or in their Amended Bill filed March 29, 1916, or in their First Amended Bill filed May 4, 1916.) [29]

(Title of Court and Cause.)

Opinion.

JESSE OLNEY, Esq., for Plaintiffs.

BERT SCHLESINGER, Esq., and LEON E. PRESCOTT, Esq., for the Defendant.

RUDKIN, District Judge.

This is a suit in equity for an accounting.

On the 11th day of August, 1913, the plaintiffs were insurers in varying amounts aggregating $21,000 in all, on a stock of merchandise in the city of Seattle owned by one, Bridge, doing business under the name of A. Bridge & Co. On that date a fire occurred in the store building occupied by Bridge, causing a loss, the extent of which is a matter of dispute between the parties to the present controversy.

Soon after the loss occurred, Bridge made an assignment to one, Truax, a representative of the Seattle National Bank, for the benefit of his creditors, and negotiations were entered upon for the adjustment of the loss. In the course of these negotiations the plaintiffs were represented by one, Main,

and the insured and his assignee by one, Mason, as insurance adjusters. The adjuster, representing the insured and the assignee, claimed a loss of $18,254.84, which was later reduced to $17,000, and finally to $16,200. The adjuster representing the plaintiffs conceded a loss of $13,588.65, but refused to concede more. Being thus unable to agree upon the amount or extent of the loss, it was finally agreed between the assignee and the plaintiffs, that the sound value of the stock before the fire, was $34,300, and that the plaintiffs would take over the stock at that figure. At the same time, and a part of the same transaction, it was agreed between Main and the defendant, that the defendant would put up a guarantee of $18,100, and sell the stock for the benefit of the plaintiffs, receiving [30] for his services in that behalf a commission of twenty per cent on the gross amount realized on the sale. Pursuant to this arrangement, the defendant paid the guarantee of $18,100 and the plaintiffs paid $16,200, thus making up the sound value of $34,300, and insuring the plaintiffs against any loss in excess of the $16,200, claimed by the insured and his assignee.

Thereafter, a fire sale was conducted by the defendant at the old Bridge stand for a period of nineteen days, exclusive of Sundays. The gross proceeds of this sale, as reported by the defendant, was approximately $18,000. At the expiration of this nineteen day period, the remainder of the stock was sold in bulk at private sale on sealed bids, ostensibly to one, Seynei, but in reality to Seynei and the defendant, who had formed a copartnership for the purpose of

taking over the stock. The amount realized on this sale in bulk was approximately $11,000.

After the latter sale, the fire sale was continued at the same stand by the defendant and Seynei, for a period of about seven weeks, some new stock being added in the meantime.

On the 26th day of November, 1913, the defendant rendered the following statement to Main:

"STATEMENT.....Salvage of A. Bridge & Co. Clothing, furniture, shoes, not sales..... $28,901.92

Expenses:

Rent	920.00	
Light	66.88	
Advertising	1204.21	
Clerk Hire.....	1655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling at 20% on $28,901.92..	5780.38	
Advanced as guaranty...	18100.00	27,852.11

Net Proceeds.....$1,049.81."

and enclosed the same together with a check in the following letter:

> "I enclose herewith statement of A. Bridge & Co. [31] salvage, together with check for $1049.81, to cover the net proceeds.
>
> Trusting you will find the same correct and satisfactory."

On December 8, 1913, Main wrote to the plaintiffs enclosing a copy of the report and stating:

> "You will also find enclosed check covering this proportion. The total insurance on stock board was $21,000. I am pleased that we are able to report a substantial salvage, although that is not as much as we had hoped for, but this is explained owing to the adverse conditions confronting Mr. Isaacs in disposing of the stock. However, the amount recovered is net gain over what we were able to close the loss with the assured through his adjuster, Mr. Mason, and, on the whole, satisfactory."

This money was retained by the plaintiffs, and nothing more was heard of the transaction until shortly before the institution of the present suit.

In the meantime, Seynei and the defendant became involved in litigation over their partnership affairs, and from certain disclosures made on the trial of that case, the plaintiffs concluded that they had been defrauded by the defendant, and demanded a further accounting. Such demand was not complied with, and the present suit followed.

Before discussing the facts, two preliminary questions of law should be disposed of. The plaintiffs contend, first, that Main as a mere insurance adjuster had no authority to represent or bind them; and second, that the burden is upon the defendant to render a full, true and correct account of his stewardship.

In support of the first proposition, my attention is directed to a provision of the Insurance Code of the State of Washington, defining the term "adjuster" or "insurance adjuster," and to a decision

of the Supreme Court of the State, construing that statute. I find no fault with that decision. Of course, a mere adjuster has not authority, express or implied, to bind [32] his principal. Like the ordinary claim agent, he can only investigate and report. But what are the facts here? Main employed the defendant, agreed upon his commission, agreed with the assignee of the insured to take over the stock of goods for $34,300, consulted with the defendant as to the time and manned of sale, including the sale in bulk, and transmitted to the plaintiffs the statement of account received from the defendant. Manifestly he did not do any or all of these things as a mere adjuster, and yet his authority in that regard has never been questioned, and is not now questioned by the plaintiffs. Like any other agent, the authority of an adjuster lies in contract and he has such authority as the principal expressly confers, and such as the principal knowingly permits him to exercise without protest or objection. Within this rule, it seems to me there can be no question, but that the acts of Main were the acts of the plaintiffs themselves, and that his knowledge was their knowledge. If such is not the case, the plaintiffs were not represented at all, for admittedly they had no dealings with the defendant, except through Main.

The second proposition advanced by the plaintiffs is, of course, sound. But here an account was rendered, and acquiesced in for more than two years without question or protest. Under such circumstances the rule is changed and the burden is shifted

to the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof.

Eichel vs. Sawyer, 44 Fed. 853.

Porter vs. Price, 80 Fed. 656.

Charlotte Oil & Fertilizer Co. vs. Hartog, 85 ed. 150.

Allen West Commission Co. vs. Patello, 90 Fed. 629.

Now, what are the facts? The claim made by these plaintiffs is somewhat extravagant, to say the least. Their printed brief opens with the statement:

> "This is a case in equity, against the trustee by his *cestui que trust* for an accounting of a sixty thousand dollar trust fund in his hands, consisting [33] of merchandise which has all been sold and disposed of by the trustee."

The unusual claim on the part of the plaintiffs that they profited upwards of $25,000 by this fire, finds some support in the testimony of Bridge, Seynei, Jeremy, and perhaps others. Bridge has an action pending in the courts of the State of Washington against his assignee to recover damages in the sum of $100,000 for sacrificing his property. Seynei, according to his testimony, conspired with the defendant to defraud the plaintiffs, and later quarreled with his partner in iniquity over the spoils. Jeremy assisted in the preparation of a false and fictitious inventory to the same end.

These witnesses testified that the damage caused by the fire was only nominal, and that the fire in fact added twenty-five per cent to the value of the stock.

Such claim and such testimony do not appeal to me very strongly. The fact is not disputed that the assignee, for the benefit of the creditors, claimed a loss in the sum of $16,200, and refused to accept an offer of upwards of $13,000. The fact is not disputed that he was willing to accept $34,300, as the sound value of the goods before the fire, which would, of course, include the value of the damaged stock and the claims against the plaintiffs. In his estimation, therefore, the value of the damaged stock was about $18,000, and other parties concerned did not differ widely upon that question.

The claim against the defendant is three fold. First, that his expense account is excessive; second, that he has not accounted for moneys received during the fire sale; and third, the claim arising out of and by reason of the sale in bulk to Seynei and himself. The only testimony offered to impeach the expense account was the mere opinion of the witness, Seynei, that it seemed large. As against this, every item in the account seems to have been fairly and satisfactorily established. The [34] claim that moneys received by the defendant during the fire sale have not been accounted for, is sought to be established in this way: An inventory of the stock was taken immediately after the fire, showing the value to be approximately $45,000 at cost price. A second inventory was taken at the close of the fire sale, showing the cost price of the balance of the stock to be approximately $24,000. The first of these inventories was assumed to be correct without proof by all parties at the trial, and I do not understand that the

correctness of the second inventory is impuned, aside from the claim that the cost price of some of the goods, was marked down. A comparison of these two inventories shows, therefore, that the cost price of the goods sold during the nineteen days of the fire sale, was approximately $20,000. Testimony was offered tending to show that these goods were sold at a considerable profit, probably twenty-five or thirty per cent above the cost price. If such were the case, it would seem clear that the sum realized during this period should be several thousand dollars in excess of the $18,000 reported by the defendant. As against this, the defendant produced at the trial several thousand sale slips, showing the sales made during this period, the goods sold, and the amount received therefor. The aggregate amount received as shown by these sale slips is within a few dollars of the amount reported by the defendant, and if we add to the last inventory the goods sold, as disclosed by the sale slips, we will have approximately the goods shown by the first inventory. The sale slips are not impeached and inasmuch as practically all of the goods have been accounted for, the claim that a much larger sum was received does not seem to find support in the testimony. The plaintiffs, therefore, have failed to show that the account as rendered by the defendant is incorrect up to the time of the sale in bulk.

It will readily be conceded, of course, that a sale by an agent to himself is voidable at the option of the principal, [35] but it must likewise be conceded that he can sell to himself with the consent

of his principal just as readily as the principal can sell to him. The fact is clearly established in this case, that the matter of this sale to the defendant was discussed before the sale, and was known to Main, and the latter testified upon the trial that he deemed the offer a fair one at that time, and was of the same opinion still. It would seem idle, therefore, for the plaintiffs to claim that they can now set this sale aside after the lapse of more than three years. The utmost they can claim would be to call upon the defendant to account for the amount of his bid, namely, forty-five per cent of the cost price. There is some testimony before the Court tending to show that the cost price, as disclosed by the second inventory, was cut down materially for the purpose of reducing the amount of the bid, but for reasons already stated, I am not prepared to say that that fact has been established.

It seems to have been understood between the parties that the defendant was to have his commission on that sale as well as upon the others, and if the bid was put in to prevent a sacrifice, there would seem to be no injustice in allowing the commission. In any event, the fact that the commission was claimed and held out was known to Maine, and through him to the plaintiffs, and no complaint was made by reason thereof.

After a full examination of the accounts, a competent expert for the defendant testified that he was unable to find any evidence of dishonesty. He candidly admitted, however, that the business methods of the defendant were crude, and his accounts abom-

inable, and in that conclusion I fully agree. The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake.

The plaintiffs declare that this suit involves not merely [36] the amount claimed, but the more important question, are they at the mercy of their adjusters and salvors. I can only say in answer to this that the business of every corporation is transacted through agents, and its success will depend upon the fidelity of these agents, and a proper supervision of the corporate affairs. And if these plaintiffs pursue, in the future, the course they have pursued in the past, the salvage end of their business will probably prove disastrous.

On the entire record, I can find no basis upon which a decree can be given in favor of the plaintiffs for any item or any sum, and the bill is accordingly dismissed.

[Endorsed]: Filed March 15, 1917. Walter B. Maling, Clerk. [37]

At a stated term, to wit, the March term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Wednesday, the 21st day of March, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern Division of Washington, designated to hold and holding this court.

No. 253—EQUITY.

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONN., INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, SECURITY INSURANCE COMPANY OF NEW HAVEN,

Plaintiffs,

vs.

DAVID ISAACS,

Defendant.

Decree.

This cause coming on to be heard upon the issues raised by defendant's answers to the First Amended Bill of Complainants and their amendment thereto, and certain evidence, both oral and documentary, having been introduced, and said cause having been

submitted to the Court for consideration and decision and said Court having considered the same:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that complainants take nothing by their said action, and that their First Amended Bill of Complaint and the amendment thereto be and the same are hereby dismissed:

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant do have and recover of and from the said complainants his costs and disbursements in this suit, taxed at [38] $———.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed and Entered March 21, 1917. Walter B. Maling, Clerk. By J. A. Schaertzer Deputy Clerk. [39]

In the United States District Court in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COMPANY et als.,

Complainants,

vs.

DAVID ISAACS,

Defendant.

Statement of the Evidence.

Testimony of Harry C. Seynei, for Complainants.

HARRY C. SEYNEI, called for the complainants, testified as follows:

I reside in the city of Seattle and State of Washington. At the time of the fire in the Bridge store I had been in the clothing business seventeen years; and had been manager and buyer for Mr. Bridge for the eleven years preceding the fire; and as manager knew perfectly the stock in every feature at the time of the fire. The nature of the stock was clothing, shoes, furnishings, and Alaska outfits. This stock before the fire was in first-class condition. About five months preceding the fire there had been a clearance sale of it and the odds and ends sold off and the stock generally cleaned up. After the clearance sale new stock came into the store; in round figures somewhere around $20,000 of new stock. The stock was hardly damaged by the fire. Its retail value before the fire averaged about 33⅓% above its wholesale cost, making the stock of goods about $60,000 in value. There was very little difference in the retail selling value before and after the fire. The actual damage to the stock by the fire did not exceed $500. After the fire that stock of merchandise would sell quicker, to better advantage and you could get more for it than during a clearance sale. [40] In round figures the value of the stock after the fire in the hands of an expert like the defendant would not be any different than the original price before

(Testimony of Harry C. Seynei.)
the fire; the retail price value being something like $60,000. On a fire sale, as a general rule, the percentage a stock is worth over an ordinary sale is about 20%; about 20% more than at regular sale. A fire sale speaks for itself.

I was thoroughly familiar with Bridge's method of buying. He was a close buyer. He only bought complete lines and at a very close figure. He discounted his bills and deducted this cash discount from the cost of his merchandise. He did not add the freight charges in setting down the cost of his merchandise. The cost as it stood on each article was net. I was familiar with the inventory taken after the fire (Plffs. Exhibit "C.") In that inventory amounting to $45,954, the discount and freight paid by Bridge should still be added to obtain a correct valuation of the stock. Mr. Bridge was a successful man in business and had been in the business twenty-five years or over. I am thoroughly familiar with the manner in which Mr. Bridge was compelled to give up this large stock of merchandise and lose control over it. He was forced to appoint a trustee at the request of the Seattle National Bank, which was the largest creditor of the Bridge estate. Mr. Truax, the bank's vice-president, was appointed his assignee, and the settlement with the complainants, Bridge's insurers, was made by him as assignee for the creditors.

Mr. OLNEY.—Q. Has Mr. Bridge since sued this assignee for damages for sacrificing this stock?

Mr. SCHLESSINGER.—I object to that.

(Testimony of Harry C. Seynei.)

The COURT.—I do not see the relevancy of that; I sustain the objection.

Mr. OLNEY.—Q. From your intimate knowledge of that store of Mr. Bridge, and his stock of merchandise, and the location, customers and trade generally in Seattle, could Mr. Bridge, if he had been let alone, have taken that stock and sold it at fire sale and made a large profit?

Mr. SCHLESSINGER.—I object to that as immaterial, irrelevant and incompetent, and not binding upon the defendant.

The COURT.—I sustain the objection.

Mr. OLNEY.—Possibly I do not understand the mind of the Court.

The COURT.—What Mr. Bridge could clear is not material here. You have asked him as to the value of the goods and he has given it.

Mr. SEYNEI.—(Continuing.) I was employed to make this inventory in evidence here (Plffs. Ex. "C.") immediately after the fire by the Seattle National [41] Bank and Mr. Main. The inventory was made at cost prices and Mr. Jeremy and others assisted me. As far as I know everything was included in that inventory, including damaged goods. If anything was omitted it was not with my knowledge or intention. The Seattle National Bank also upon its taking had an accountant present who checked the invoices and the inventory. He checked up the inventory after it was taken by me and also the invoices of the merchandise to see that the inventory corresponded with the invoices.

(Testimony of Harry C. Seynei.)

I first met the defendant about three or four days after the fire; and he employed me to assist him in conducting his sale for the complainants of this Bridge stock. This sale for the companies was conducted entirely in the Bridge store at the same location as Bridge conducted his business before the fire. The goods at this sale were sold over the counter at retail exclusively. I know of no sales in bulk of that insurance stock except the final one to the defendant.

After the fire the store was closed and the merchandise thoroughly sorted out under the direction of Mr. Main to preserve and take care of the stock in the best manner for the insurance companies, the inventory being taken at that time. It took two weeks to take the inventory (Plffs. Ex. "C.") I was in full charge of the marking of the merchandise for the insurance sale and directed how they should be marked. They were marked on an average 20% above the inventory wholesale cost. There was nothing marked below the original cost price except a few of the slightly damaged goods and also some things like Arrow Brand collars that were used as leaders in the windows to attract the public. This percentage marked below was very little and they were inconsequential. These prices after they were marked were not cut at all during the insurance sale. Some were raised, such as shoes, overalls and collars. Some collars were damaged, some were not. We used them to attract the public; they were not below; they were raised at request of the Arrow Brand

(Testimony of Harry C. Seynei.)

people two days after the sale opened. These sale prices were easily discernible on the tags and were marked in red pencil for the insurance sale. For instance, on these tags (Plffs. Exhibits 1) [42] this one, the cost price is $5.75; the retail selling price for the insurance fire sale $8.90; and it was sold at that price. Here is another. This is a suit. Its cost price was $9.50; and it sold for $12.75. It sold at the latter price upon the fire sale. Here is another. This cost $7.75 and was sold for $12.50. Here is another. This cost $8.50 and sold for $11.75. Here is another. This cost $11.50 and sold for $13.50. And another. This cost $7, and sold for $10. And another. This cost $10.50 and sold for $12.75. Here is another. This cost $5, and sold for $8.50 upon the insurance sale.

Mr. OLNEY.—Do these tags which I have shown you, and which have been offered in evidence here, represent a fair average of the prices that the merchandise upon that three weeks fire sale for these complainants by this defendant brought?

Mr. SCHLESSINGER.—Objected to as irrelevant, immaterial and incompetent.

The COURT.—My recollection is that the witness has already testified they were marked up 20% from the cost price, has he not?

Mr. OLNEY.—Yes.

The COURT.—I will sustain the objection.

Mr. SEYNEI.—(Continuing.) This insurance sale of three weeks was a successful sale and conducted as a fire sale. The first few days it was ad-

(Testimony of Harry C. Seynei.)
vertised very heavily; but afterwards did not require much advertising. During the sale it was at times necessary to close the doors. The clerks were all kept busy. To the best of my knowledge about one-quarter of the entire inventory was sold at that fire sale.

The defendant remarked it was a very successful sale, and that he had made good. He made that statement at various times in my hearing. Towards the close of the sale with regard to the amount of money he had taken in with reference to his guarantee and expenses, he said he had made his guarantee above his expenses. That was three days before the close of the sale. He said he made his guarantee good above all expenses. Some of these conversations occurred in the presence of Mr. Bailey. Mr. Jeremy was our next best man and I think he was once or twice present during these conversations. The defendant made also these statements to Mr. Main, if I am not mistaken, and also to several travelling men. [43]

I never saw any books kept by the defendant on that sale. I handled the sale for him and would have had knowledge if any books were kept, but I did not see any books.

The sales tags were taken possession of by the defendant every evening, and by his wife and daughter. Mrs. Isaacs was present at that time and took the sales tags and charged them up.

Sales slips were not made at all times during that sale of every article. During the rush days we had

(Testimony of Harry C. Seynei.)

no time to make out sales slips; we gave orders to all the clerks at that time to bring the goods to the desk and they were checked up when the wrapper charged them up; we could not possibly take time to make slips for all the sales made at that time.

The defendant's cash register was out of order and was not used as a cash register but as a cash drawer to make change so that there were no tickets to the cash register. Although I managed that sale I never saw any cash register or adding machine totals of the money taken in. The cashier's department was entirely in the hands of the defendant's own family. Every evening the defendant took across the street the cash from the sale over to Mr. Aronson's, a wholesale liquor place, and put it there over night for safekeeping until the next morning. I asked Mr. Aronson as a favor to let defendant use his safe; that is as far as I know what became of the cash. The defendant thus had a safe place to keep the cash without the employment of a safe deposit box. There was no necessity for him to hire a safe deposit box.

The first day of that insurance sale there were thirty or thirty-five clerks employed. Towards the end of the sale these were reduced to about fifteen in all; ten men and five ladies. The average amount paid the clerks was $15 and up a week for the men, and $9 to $12 for the ladies. The defendant's statement to the complainants (Plffs. Ex. "2–q") charging up some $1,665, or $551 a week clerk hire against them looks to me as an exhorbitant amount for clerk

(Testimony of Harry C. Seynei.)

hire. To the best of my knowledge there could not have been more than $800 paid out for clerk hire; there was only one or two days they had extra help and they were [44] not expensive help; they did not require expensive help for that sale.

After the insurance sale for these complainants closed, I continued the sale of this stock for the partnership of H. C. Seynei & Co., and our partnership sale lasted seven (7) weeks, four weeks longer than the insurance sale. This partnership sale was conducted at the same location, same rent, and same advertising; same place and everything.

Mr. OLNEY.—What was your clerk hire during that time?

Mr. SCHLESSINGER.—I object to that as immaterial, irrelevant, and incompetent.

The COURT.—I will sustain the objection.

Mr. SEYNEI.—(Continuing.) The defendant paid the clerks personally their wages that I know of out of the cash drawer on the insurance sale in cash. So this money paid for clerk hire was never banked. The defendant never took receipts from the clerks for their wages on this sale he conducted for the complaints; but later on, after that sale was ended and I continued the sale with the balance of the stock for the account of Isaacs and myself, he insisted on my taking receipts from the clerks as vouchers to show him. In other words, when he was representing somebody else he did not take them, but when he was representing himself he was very careful to see

(Testimony of Harry C. Seynei.)

no documents went astray; he had a daily report from me every day.

Mr. OLNEY.—What else were you compelled to give Mr. Isaacs when you were conducting the sale of H. C. Seynei & Co.?

Mr. SCHLESSINGER.—I object to that as immaterial.

The COURT.—I sustain the objection.

Mr. SEYNEI.—(Continuing.) I first talked with the defendant about forming a partnership about four or five days after the insurance sale commenced; maybe four days; somewhere about there. He broached the subject to me. He said he wanted to get through as quick as possible with these complainants sale and make his guaranty good and then he should buy the stock for himself and put me in the business in the same location; he would buy the stock in my name and put me in the business, and take [45] me in as a partner; I to conduct the business at the same location under the name Harry Seynei & Co. About the end of the last week of the insurance sale the defendant told me he had made his guaranty good and might as well close it; that he would have to take an inventory, and make a showing he was not the bidder for it, and to lump it off, and he would advance the money and buy it in my name. He told me to submit a bid and when I should submit my bid after the other people had made their bids. And he accepted it.

Shortly afterwards the same week the defendant closed the sale at retail for these complainants; and laid the best goods aside up in the balcony; and the

(Testimony of Harry C. Seynei.)

remainder of the merchandise was tied up in bundles to make it look as discreditable as possible; that is to make them look as cheap as possible; so that they would not look as good as when they were opened up or hung up as merchants would do. This was done on Sunday before the sale in bulk on Monday.

The merchandise so laid away was the best part of the clothing, and that means suits and overcoats, mackintoshes and some shoes. It might be $5,000 worth and it might be more than that. This was some of the best merchandise in the stock at the time and was not opened to bidders in the sale in bulk. They were afterwards taken down and used in the partnership sale; they were taken from the balcony and placed downstairs and opened for sale. I took the second inventory but I do not know whether the goods that had been placed by Mr. Isaacs in the balcony were included in this inventory or not.

Regarding the offering of the complainants' merchandise in bulk for sale under sealed bids the defendant said he did not want Mr. Main to know he was the owner of this stock; that he had to publish it in the paper that this would be sold in bulk and that it would be opened for bids on Monday afternoon at three o'clock; but that stock was sold, that is supposed to have been sold, to me in my name before noon on Monday. The defendant stated the reason he did not want his own name to appear was that he did not want Mr. Main and the insurance companies to [46] know he was actually the owner of the Stock.

(Testimony of Harry C. Seynei.)

He used my name on the sale, the bid being placed in my name. This is a copy of the bid (Plffs. Ex. 2); the defendant dictated that himself in my presence to the stenographer, and I gave it back to him after I signed it.

The defendant's statement to the complainants that the highest bid was 45% of the cost was false; the highest bid was 47%; the fact is this bid in his hands was two per cent more. Although my name was used the defendant was the actual purchaser; he bought the stock. I did not have eleven thousand dollars to pay for this stock at that time.

The defendant purchased these goods in bulk for himself from the complainants for $8,075 net, and then sold them to our partnership for $11,094 and that amount was charged to our partnership on the books of H. C. Seynei & Co. afterwards opened; my books show that was the amount. The defendant thus made a personal profit of over two thousand dollars for himself.

The defendant made arrangements with me looking to the elimination of competition for that sale in bulk. He asked me to speak to my friends who had known me in Seattle not to interfere, so I would get the stock.

The defendant's sale for the complainants closed on a Saturday night and the next day a small ad was placed in the "Seattle Times" in the want ad column. That ad appeared in the "Seattle Times" of September 28th, 1913, on page 9. This is the ad (Plffs. Ex. "B."):

(Testimony of Harry C. Seynei.)

"The balance of the A. Bridge & Co., 103–05 First Ave., Seattle will be offered for bids Monday, Sept. 29, at 3 P. M. Coast Fire & Marine Insurance Co. D. Isaacs. Manager."

That is the ad the defendant wrote and I took it up and the "Seattle Times" published it.

I was in the store at all times during the insurance sale and I did not see any people there examining the stock for the purpose of making a bid. [47]

I do not know of anyone sending in bids at that time; no one at the sale in bulk.

After the fire sale and before the sale in bulk, the defendant took an inventory of the remaining stock of merchandise. This was taken on Sunday. This inventory was taken while the defendant was there with his wife and daughter; and I was present part of the time. I helped considerably in the taking of that inventory (Plffs. Ex. 4).

Q. Is this that inventory? A. Yes.

Mr. OLNEY.—We offer the same.

The COURT.—It will be admitted.

Mr. OLNEY.—Was that inventory taken at Bridge cost prices?

A. It was taken the same as it was taken for the insurance sale, except that Mr. Isaacs took some suits tied up in bundles, suits which cost as much as $15 wholesale and mixed them in the $9 pile, lumped them off, and made them $9.50 or $9.

Q. Then it was not taken at Bridge cost prices?

A. I said a while ago he mixed them up.

Q. As I understand, then, for the purpose of this

(Testimony of Harry C. Seynei.)

inventory, the higher priced goods were taken and wrapped up in bundles and tied up and marked at a very lower price?

A. It was mixed up with the cheaper stuff, so many suits at $9, mixed with the higher priced stuff.

Q. So that that depreciated the inventory so much?

A. Yes, the clothing was depreciated very much.

Q. How much did that depreciation run?

Mr. SCHLESSINGER.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—He may answer subject to the objection.

A. It was considerable.

Q. About how much? You must know?

A. The inventory plainly shows the amount of suits taken at $9.50 for the insurance company after the three weeks successful sale, and the amount of suits taken after the sale—the fire sale at $9.50, left in the remainder of the stock shows there must have been at least $3,000, or $4,000, maybe more, maybe $5,000, mixed up—that is, the higher prices mixed up with the cheaper, and he reduced it by keeping them tied up in the cheaper merchandise.

The COURT.—$4,000 or $5,000 in all?

A. Yes; that means in the lower cost.

Mr. OLNEY.—He had the price lowered in that way?

Mr. SCHLESSINGER.—I object to that as immaterial, irrelevant and incompetent.

(Testimony of Harry C. Seynei.)

The COURT.—I will admit it subject to the objection.

A. Mr. Isaacs himself dictated the inventory; he took the figures down.

Q. What did Mr. Isaacs say to you in reference to the depreciation of this inventory?

A. He naturally wanted it to look as low as possible.

The COURT.—The question is what did he say, if anything?

A. Mr. Isaacs said he did not want Mr. Main to know how much stock there was left on the premises.

Mr. OLNEY.—Q. What was the purpose of taking that inventory?

Mr. SCHLESSINGER.—I object to that as calling for the conclusion of the witness, and immaterial.

The COURT.—I sustain the objection unless he knows.

Mr. OLNEY.—He was a partner of Mr. Isaacs. [48]

A. The purpose of taking it was for him and me to become partners in the business.

Q. I want you to state, Mr. Seynei, the conversation that you had with him, and what he said to you.

A. He wanted to show his bid was highest, and make it look as though he bid as much as the stock was worth.

Q. Have you stated all the conversation that you had with Mr. Isaacs in reference to depreciation of this inventory, and statements by him as to why he

(Testimony of Harry C. Seynei.)

depreciated the inventory?

A. I think I have answered plain enough that he wanted the stock for himself, and had depreciated it as much as possible so he would not have to account for it.

Q. He said that to you?

A. Yes. I think I made it plain enough a while ago.

Mr. SEYNEI (Continuing).—This second inventory (Plffs. Ex. 4) was made for the purpose of the sale in bulk.

After the sale in bulk by the defendant to himself these prices which had been so depreciated and lowered were raised and the merchandise sold for more money than it was taken in the depreciated inventory for.

I was the resident partner of the defendant in the city of Seattle after the sale in bulk to himself and as such continued the sale there of that merchandise and had charge of the keeping of the partnership books of H. C. Seynei & Co. for that sale. The sale opened up the first week in October in the same building, on the same premises, in the same location, and ran seven weeks. The same selling prices were left on the Bridge merchandise upon that sale as upon the insurance sale and the stock was sold on that price. I had full charge of the sale and was the resident partner. The defendant was not there during the sale. The amount of new merchandise purchased by the partnership during that sale was $6,000. I purchased it. It was merchandise to fill

(Testimony of Harry C. Seynei.)
in short lines of certain special departments. The merchandise so purchased was about one-fourth or less than the entire stock of Seynei & Co. on the partnership sale. The inventory (Plffs. Ex. 4) was $24,-600. There was about $500 of new clothing purchased to reinstate the entire partnership stock such as trousers and raincoats and mackintoshes.

The clothing at all times both at the insurance and partnership sales represented one-half the entire stock. When we opened our partnership books of H. C. Seynei & Co., it inventoried half the entire stock. [49] The clothing therefore on the sale of H. C. Seynei & Co. was practically all the original Bridge stock.

At the sale conducted by me for H. C. Seynei & Co. the total sales amounted to over $16,000. Sales of new stock were about $1,500.

At the close of the seven weeks during which the partnership sale of H. C. Seynei & Co. ran, the defendant and I took an inventory of the balance of the stock remaining. These two books are that inventory. (Plffs. Ex. 8.) This statement (Plffs. Ex. 9) taken from this Third Inventory showing $16,633.57 as the final amount of merchandise remaining at the time the stock was placed in the warehouse is a correct statement taken by my bookkeeper from the books. It is a recapitulation of this Third Inventory. This Statement of $16,633.57 deducted from the total merchandise on hand, as shown by the partnership books of H. C. Seynei & Co., of $30,917, leaves a balance remaining of $14,283 of merchan-

(Testimony of Harry C. Seynei.)

dise; and if the Seynei books show this $14,283 of merchandise sold for $16,067.94, it leaves a profit of $1,700; a little over that at the Seynei sale.

I have testified that one-quarter of the new stock was sold for $1,565, at one-third profit, or approximately a profit of $521; and by deducting that from the total profit of $1,784 you find the profit on the Bridge stock alone, about 10% profit on the remainder of the stock; about $1,200. Thus the Bridge stock on the Seynei sale sold for $1,264 more than its inventoried cost price; which is about 10% above cost.

The merchandise at the insurance sale did not sell 20% below cost as claimed by Mr. Isaacs.

The defendant's interest in our partnership was never made known to the general public. It was at all times a secret sale; a secret partnership. This secrecy was compelled by the defendant. The reason he gave was that he did not care to have Mr. Main know anything about it, that he was the owner of that stock. So my name was used individually. The name of H. C. Seynei & Co. was never publicly used. I advertised in [50] the public papers. These are the advertisements (Plffs. Exs. 11, 13, 14, 15).

With reference to these books of H. C. Seynei & Co. which are in evidence, the defendant directed their opening and was explicit as to how they should be kept in detail. It was at his direction that the merchandise sold in bulk to himself was debited in the ledger (Plffs. Ex. 7) at pages 4, 6, 8, 10, 12, 13,

(Testimony of Harry C. Seynei.)
14, 16, with the full amount of the inventory, $24,600.

The defendant charged the partnership $11,094 for that Bridge stock; and that sum was placed upon the books as a credit to him at that time, and the firm of H. C. Seynei & Co. was charged on the books with merchandise at the value of $24,600. This merchandise was entirely the original Bridge stock.

The sale in bulk of this stock occurred on a Monday morning and on that evening I had a conversation with him at the Hotel Herald in Seattle. At that time and in that conversation I went over with him the amount of the merchandise which had been purchased for the firm business. These two sheets of paper (Plffs. Ex. 16) upon the Hotel Herald stationery, were made out by the defendant at that time in his own handwriting. They show in his own handwriting what the merchandise was worth, what was to be charged up to me, how much to account for: on the other side the departments are specified, the individual departments such as Clothing Department No. 1 to Department 8. These are all in his own handwriting. At the time he made out that paper he said to me the stock was actually worth the amount of money written on that paper; and he figured the stock to us was worth $24,600; and that I should account to him for every dollar received for that stock; and new goods I continued to buy in conducting that business.

The defendant spoke at the time of the profit, about $13,000 he made on the transaction of the sale in bulk at that time and said he had made a success-

(Testimony of Harry C. Seynei.)

ful purchase from the complainants; that there [51] was no reason why I should not make a success of that stock; that I had the best of it, to his knowledge; and that the merchandise was actually worth the amount of the inventory—one hundred cents on the dollar.

Cross-examination.

I did not see Mr. Main there at any time upon the taking of the inventory. I do not know the amount of the damage to the stock as estimated by Mr. Truax or the Seattle National Bank, the assignee of Mr. Bridge. My judgment of the damage was $500. Mr. Bridge claimed to have had a very heavy damage by smoke but he didn't know the exact amount. It was not $18,000 or thereabouts. I am unable to recall the sound value of these goods before the fire. The sound value agreed upon between the assignee and the adjuster was never satisfactory to Mr. Bridge. I don't know what agreement the adjuster had with Mr. Bridge or how far they agreed upon the amount of the loss. The only thing that was ever fixed by me was the actual inventory, which I turned over.

Mr. OLNEY.—We object to all this. It is merely hearsay.

Mr. SEYNEI.—(Continuing.) Isaacs realized more than $28,901.92 from the sales at retail and the sale in bulk. There was $48,000 invested in that stock before the fire and the sound value of that stock to my knowledge at wholesale prices was one hundred cents on the dollar.

(Testimony of Harry C. Seynei.)

At the retail sale I engaged the clerks. I have no reason to question their integrity, then or now. The clerks made out the sales slips in the usual custom showing amounts and items. The sales slips were numbered serially; one was given to the customer, the other the cashier retained. This was done except instances when we were too busy to make out the sales slips.

On the sale for the complainants, the retail sale, the cashier was Mr. Isaacs, Mrs. Isaacs and Miss Isaacs.

I was not interested in the profits of that sale. My interest was to make it a success. I was under a salary at the time. [52]

Isaacs talked with me about forming a partnership three or four days after the insurance retail sale started for the purpose of conducting a retail concern with the remnants and also by replenishing the stock. I contributed no money to that partnership. All that I was to contribute was my credit. I was present when the sale in bulk occurred.

Mr. SCHLESSINGER.—Now, there has been some suggestion made here—I say "suggestion"—that Mr. Isaacs bid in that stuff clandestinely. Were you present when these bids were opened?

A. What bids?

Q. The bids for the remnant stock, the tail end of the stock? A. There were no bids.

Q. (Intg.) Were you present when that sale occurred? A. Yes.

(Testimony of Harry C. Seynei.)

Q. Were there any other persons present bidding on that stock?

A. There were three, if I remember, but they were not exactly bidding.

Q. Did any other persons file bids for that stock?

A. There were no bids.

Q. I am asking what the fact is, did any other person file bids, papers, letters or documents showing how much they would buy that stock for?

A. Yes, there were some.

Q. How many?

A. To my knowledge there were two or three.

Q. Only two or three?

A. Not any more than that.

Q. Did you know the two or three who filed bids?

A. Yes.

Q. What are their names?

A. Mr. SCHIRMER.—(Witness continuing.) He is a merchant of good standing. I did not see his figure. He did not make any offer of money that I know of, and I have never heard that he offered $4,000. There was some offer made. He did not bid for it. The other two persons were friends of Mr. Isaacs living in Seattle. Those men did not bid.

Mr. SEYNEI.—(Continuing.) I was in the store on that morning until noontime and did not see any of those men present. Those men had no opportunity to make an examination and did not make any examination of that stock.

Mr. Isaacs paid $920 rent for one month. I do not know the amount of the light bill during that period.

(Testimony of Harry C. Seynei.)

The sum of $1204.21 for advertising may be correct. In the defendant's statement of expenses the item of clerk hire looks very heavy.

Q. Are you able to estimate of your own knowledge the actual amount of money which these various clerks earned and the actual amount of money which they received at the hands of the defendant?

A. Only basing it on the figures of the same clerks I hired, from 10 to 15, and basing it on figures he did, it shows he had considerable more than I did.

Q. As a matter of fact you have not by either talking with these clerks or in any other way calculated the amount actually paid them by Mr. Isaacs?

A. No, I cannot so state. [53]

Q. Mr. Isaacs, and of this there can be no question, purchased the tail-end of this stock?

A. You might call it the tail-end, yes.

Q. Do you know how the sales toward the conclusion, toward the end of the sale, along about the nineteenth day,—do you know how the receipts of that day compared with the previous days' receipts?

A. Naturally they would not be as big as the first day.

Q. In other words, as the days went by the receipts—

A. (Ing.) The receipts varied on different days.

Q. That is customary, is it not?

A. In every fire sale.

Q. In every fire sale?

A. Yes; it varies on different days; some days

(Testimony of Harry C. Seynei.)

more and some days less; but the sale was progressing just the same.

Q. But with diminished receipts?

A. It was not what you call diminished; it was not as big as the first day.

Q. Now, then, it became necessary that the goods should be sold in bulk? A. Not necessary, no.

Q. They were sold in bulk, were they not?

A. Yes.

Q. You had an interest in that stock? A. No.

Q. It belonged to the insurance companies and Mr. Isaacs? A. Yes.

Q. At that time, just a few days before the sale in bulk to Mr. Isaacs, you and he had practically agreed upon a partnership had you not, as you stated? A. How many days?

Q. A few days before?

A. Some time before that, yes.

Q. As a matter of fact a partnership agreement had been drawn between you but not signed; isn't that true? A. Yes.

Q. These goods having been purchased by Mr. Isaacs,—and by the way there was a bid put in there for that stock of goods, was there not?

A. Mr. Isaacs put in the bid.

Q. With your knowledge?

A. He told me how much to put in the bid for.

Q. It was put in in the name of Seynei & Co.?

A. No.

Q. In the name of Harry Seynei?

A. Correct.

(Testimony of Harry C. Seynei.)

Q. After that was the store closed down for a few days? A. I closed it down.

Q. You closed the store down? A. Yes.

Q. And you took an inventory, did you not?

A. An inventory was taken before that time.

Q. Then when you next opened the store it was in the name of Harry Seynei? A. Yes.

Q. Your name was put over the door? A. Yes.

Q. The same stand where you had been employed for nearly a dozen years? A. Yes, sir.

Q. And where you were very well known and favorably known? A. Yes.

Q. Now, did you add to that stock any?

A. Yes, just a little.

Q. Who made those purchases? A. I did.

Q. Who paid for them?

A. The firm of Seynei & Company.

Q. But you did add to the stock?

A. Yes; not all at one time, but a little from time to time.

Q. As you needed stock you replenished it?

A. Yes.

Q. Do you recall how much stock you had on hand there, eliminating the $11,000—how much new stock you bought when you opened your doors?

A. I don't think it would exceed $300 or $400 in the beginning.

Q. How much new stock did you *but* altogether, approximately? A. $6,000.

Q. Do you know how much Mr. Isaacs purchased that stock for?

(Testimony of Harry C. Seynei.)

A. $11,094. He told me how to put it in.

Q. Did you know he had advanced the insurance company as a guarantee in cash the sum of $18,100?

A. That is what I am told, yes.

Q. You referred to some concealment of Mr. Isaacs' connection with that business. Did you and Mr. Isaacs discuss the advisability of your conducting [54] that business in your name?

A. Well, Mr. Isaacs said he wanted to conduct it in my name exclusively.

Q. Was there any reason stated for that?

A. He didn't want the insurance companies to know he owned that stock.

Q. Is it not a fact that the insurance company not only knew that he owned the stock, but knew what he had paid for that stock, didn't you know it?

A. No.

Q. Did you know Mr. Main, the adjuster?

A. Yes.

Q. Did you talk with Mr. Main about the amount of money Mr. Isaacs paid for that stock?

A. No, I did not.

Q. You know George C. Main, do you?

A. Yes, I do.

Q. Were you present when Mr. Isaacs' bid was opened? A. Yes.

Q. Were you present when other bids were opened?

A. As I said awhile ago, I didn't know of any other bids.

Q. Were you present when any other persons were

(Testimony of Harry C. Seynei.)

present there offering to buy that stock?

A. There were three gentlemen there, as I recall.

Q. Were you present when there was a bid opened for $10,000? A. No.

Q. Were you present when there was a bid opened of $4,000? A. I didn't see those bids.

Q. Do you know Mr. Seynei that Mr. Isaacs bought that stock in your name pursuant to an understanding had with the adjuster, Mr. George C. Main? A. No.

Q. Do you know that he and Mr. Main agreed that in order that the stock should bring the highest possible sum that he would bid for it himself?

A. No.

Q. Do you not know that his bid was the largest bid?

A. There were no bids made, as far as I know, except his own bid.

Q. Do you know a Mr. Colsky?

A. I have heard of the gentleman.

Q. How long have you known him?

A. I have known him by name for several years.

Q. Is he a business man in Seattle?

A. He is a salvage man.

Q. Did you see him on that Monday? A. No.

Q. Did you ever see him examine that stock in that store?

A. The only time I ever saw Mr. Colsky looking over the stock was previous to the adjustment of Mr. Main.

Q. Will you say whether or not he bid on that

(Testimony of Harry C. Seynei.)

stock of your own knowledge? A. He did not bid.

Q. Do you know a man named Samuel Cohen?

A. No.

Q. Do you know a man named Gerber?

A. I know him by name.

Q. What is his business?

A. He is a real estate broker.

Q. Was he ever in the men's furnishing goods business? A. Not as far as I know of.

Q. Does he live in Seattle? A. Yes.

Q. You did not see him there? A. No, indeed not.

Q. Do you know a Mr. H. Kessler? A. Yes.

Q. Does he live in the city of Seattle?

A. Yes.

Q. Is he a business man? A. Yes.

Q. Did he file a bid? A. He did not.

Q. Did he examine the stock?

A. No, I never saw him in the house.

Q. You never saw him in the house? A. No.

Q. Do you know a man named Morris Butnick?

A. I have heard of him.

Q. Is he a business man in Seattle?

A. He was in Seattle.

Q. Do you know whether he bid on this stock?

A. The only time he bid for stock was after my conducting of the sale of seven weeks, just on the shoes.

Q. What is the fact, did he bid or did he not bid?

A. Not on this stock, no.

Q. He never bid for this stock?

A. Not for this stock of the insurance company.

(Testimony of Harry C. Seynei.)

Q. Do you recall Mr. Seynei how much the insurance companies offered to settle their losses for?

A. I have no knowledge of it, no. [55]

Q. Do you recall that Mr. Bridge claimed a loss of $18,100, and the adjuster offered to settle for $16,200? A. I don't know as to that.

Q. Did you ever talk with Mr. Main on the subject of Mr. Isaacs bid for the remnant stock?

A. I never discussed it with him.

Q. Did he not state to you that he considered Mr. Isaacs' bid very fair?

A. I said I never discussed the bid with Mr. Main at all; I don't know anything about it.

Q. Never talked with him? A. No.

Q. You have never been engaged in the salvage business? A. No.

A. Your work has been confined to selling goods in a usual way in a retail store?

A. Buying and wholesale and retail.

Q. And I take it in a word to summarize your testimony you have no personal knowledge of any of the items involved in this account, of your own knowledge, have you? A. What account?

Q. In the statement rendered by Mr. Isaacs to the insurance company?

The COURT.—He said that the rent was correct but outside of that he didn't know anything about it.

Redirect Examination.

Mr. OLNEY.—Q. Mr. Seynei, you spoke of new stock being purchased on the Seynei sale, some $6,000? A. Yes.

(Testimony of Harry C. Seynei.)

Q. I think you said that only about one-quarter of that stock was sold? A. Yes.

Q. What was done with the three-quarters of that new stock that was not sold?

Mr. SCHLESSINGER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I suppose the balance of the stock was shipped to San Francisco?

Mr. SCHLESSINGER.—Certainly.

Mr. OLNEY.—If that is admitted that is all.

HARRY C. SEYNEI, recalled.

The firm name in the partnership agreement was to be H. C. Seynei & Co., but the business to be conducted under the name Harry Seynei. The agreement was David Isaacs and H. C. Seynei; but the partnership was to be conducted under the name of H. C. Seynei & Co.

Mr. OLNEY.—Q. Mr. Seynei, there is one question I omitted to ask you yesterday. On the former trial in this court regarding this partnership which has been referred to, the case of Seynei v. Isaacs, Equity Cause 83, in this court: Did you testify on the stand at that time substantially as you have testified in this trial? I will ask you whether upon that trial you testified that the merchandise sold upon the insurance fire sale by this defendant brought from 20 to 25 % above the inventory cost price?

A. I did so.

Testimony of John Jeremy, for the Complainants.

JOHN JEREMY, called for the complainants, testified as follows:

I am merchandise man for the McCormack Bros. stores in Seattle and Tacoma, Wash. I have been nearly twenty-two years in general merchandise and have handled the best and poorest in the world during those twenty-two years. During that time I have been engaged in London, England, Canada, Manchester, England, Tacoma and Seattle. My connection was always as salesman.

I was employed in the store of A. Bridge in the city of Seattle before the fire there in August, 1913. I came there about March that same year. I assisted Mr. Saynei in overseeing the buying. I picked out my patterns and he did the buying, and I was still in that employment at the time of that fire in the Bridge store and continued to be employed right along there [56] after the fire by the defendant who was acting for the insurance companies. Then after this sale for the companies I was employed in the sale of the balance of the Bridge stock by the firm of H. C. Seynei & Co. So, I have a thorough knowledge of that stock of merchandise from the period commencing some five months before the fire.

I assisted in taking this inventory, Plffs. Ex. "C," in August, 1913, in Seattle, immediately after the Bridge fire there. Absolutely everything was included in that inventory. In my opinion that inventory is just and correct. The same cost prices

(Testimony of John Jeremy.)

that were on the tags were put in that inventory absolutely.

Mr. Bridge, the owner, was a close buyer. He was a shrewd business man.

From my personal knowledge of that stock of merchandise I would say that stock would fetch more after the fire than before. The stock was worth more after the fire than before, because you make a big drawing by a fire sale. In my opinion the value of that stock immediately after the fire was twenty-five per cent increase over the original cost price.

The actual damage caused by the fire was between $500 and $600. The goods in the store were all arranged on racks and show cases. There were just two of these tables damaged by the fire.

I was familiar with the Bridge cost marks by which the merchandise was marked. It was Buckingham. It remained on that stock of merchandise during the insurance sale by the defendant. The marks for that insurance sale were made under the defendant's direction. We put a red mark on all tickets. All were similarly marked so that anyone looking at the original Bridge cost marks could easily see the present selling prices. These selling prices on that sale for the complainants were marked about 25% above the original Bridge cost prices and the merchandise was absolutely sold at those selling prices. We all had instructions before that sale opened how the stock should be sold. Everything was marked with plain figures and was to be absolutely sold at that price. I should say three-

(Testimony of John Jeremy.)
quarters of the stock on that insurance sale was so marked above the [57] Bridge cost price. The defendant and Mr. Seynei gave instructions as to how the merchandise should be marked on that sale. These were, to mark them up 25% above the Bridge cost price, and we did so; and they were so sold as they were marked.

I marked the clothing myself personally. I had charge of all the clothing, which represented the biggest part of the stock. I made a slip for everything I sold, even during the busy times; what was the custom generally I do not know. In a general way I was familiar also with the way in which merchandise was marked on that insurance sale in the other departments as to being above or below the original Bridge inventoried cost. It was all marked above Bridge's cost with the exception of that which is absolutely burned, which, as I testified, was not over $500 or $600.

Some months before the fire while I was employed in the store there had been a clean-up sale of odds and ends of that stock conducted by a Mr. Burk. I was there *there* the last two days of it. After that clearance sale new stock came into the store, between $20,000 and $22,000 worth. There was considerable new goods in the store after the fire.

No stock on that insurance sale was sold at wholesale.

During the course of the complainants' sale I had conversations with the defendant at which he said it was going fine, keep it up, we are on velvet.

(Testimony of John Jeremy.)

The first few days this insurance sale was much advertised. Maybe on overalls the prices were raised; the first few days we sold them at so low a price you could not get them unless you replenished the stock. The merchandise sold rapidly. There were six clerks in the clothing the first couple of days and we averaged about $250, apiece all around. During that three weeks of the insurance sale about one-half of all the clothing was sold. [58]

Those three weeks of the insurance sale we were paid in cash but gave no receipts. I worked later for the firm of H. C. Seynei & Co. and upon that sale we gave receipts to Mr. Seynei.

It was about the Thursday before the insurance sale closed I heard it was going to be shut up. I could see no reason for closing that insurance sale. The sale was running along all right.

The defendant did not employ a bookkeeper or cashier on his sale for these complainants, only his wife and daughter were employed as such. The defendant and his family handled all the cash. I did not see any books being kept of the insurance sale.

I was employed upon the Seynei sale which was continued and sold right along with just about the same marks as the insurance sale. On this Seynei partnership sale none of the Bridge stock sold below the Bridge inventoried cost, except a few leaders for bites. That was all. This Seynei sale was not a fire sale. It was just a clean-up sale.

With reference to the Bridge stock at these two sales the fire sale averaged higher prices than the

(Testimony of John Jeremy.)

Seynei sale. I had charge also of the clothing department at the H. C. Seynei & Co. sale. I should say about fifty suits and about three dozen pants and some raincoats were bought new; about $1,000 would cover the lot. The Seynei sale was just a clean-up sale, building up new business.

One-quarter of the new stock sold at the Seynei sale and had a profit of 33⅓%.

I was present when the second inventory was made. It was made on a Sunday right after the first sale, the insurance sale, was closed the day before. The sale in bulk occurred upon the next day, Monday. In the making of this second inventory we made the stock look as cheap as possible for the bidders—the outside bidders; made it look as cheap as we could. This was by the defendant's direction.

Mr. SCHLESSINGER.—I object to that, if your Honor please, on the ground it is not within the issues involved in this controversy. There is no claim here that the company was defrauded by reason of any act [59] on the part of this defendant in the matter suggested by counsel's question.

The COURT.—The objection to any testimony tending to show actual fraud will be sustained.

Mr. OLNEY.—Exception.

Mr. JEREMY.—(Continuing.) Upon the taking of this inventory the merchandise was all stacked up in piles ready for the sale the next day, lumped up; we moved the tables all around to make it look as rough as we could.

I was present when the defendant put up the bal-

(Testimony of John Jeremy.)

ance of the merchandise in bulk for sale. There were present three or four people besides Mr. Isaacs, Mr. Seynei and myself. Some were local merchants from the city. Isaacs came down from the balcony on the right-hand side as you are going in and stood there a little while and pulled out his watch, and says, "Well, boys, the time is up; the stock's sold to Harry Seynei." That was in the forenoon.

Q. Were the bids in his hand?

A. He had a few slips of paper in his hand. I did not see him open any bids.

Cross-examination.

I received $25.00 a week and commissions. I received no directions from defendant as to how I should fill out those slips.

I saw no bids. I saw no one looking around examining the stock. The total loss was only $500. Maybe about a dozen pair of trousers were a loss; only the shirts on one counter, about two dozen, were a loss. The fire was all over in twenty minutes. The entire fire was confined to one place about six feet.

Q. How long did it take you to examine that stock for the purpose of estimating the loss at an exact $500?

A. It did not take me more than 25 minutes or half an hour. I did not see any bids for the tail end of the stock. I did see one or twe people there. I saw Mr. Schirmer by the store after the bids were closed. I saw him looking through the stock. The defendant had three or four papers in his hand but I could

(Testimony of John Jeremy.)

not tell the contents of them—whether they were or were not bids. In testifying that goods damaged by fire were sometimes worth more than new goods, I meant a bigger drawing card for the public, and in giving that testimony I was general, not having in mind this particular transaction. [60]

Testimony of George T. Klink, for Complainants.

GEORGE T. KLINK, called for the complainants, testified as follows:

My business is that of Public Accountant and I am senior member of the firm of Klink, Bean & Co., with branches in different cities of the coast.

I have prepared a summary of the Seynei books in evidence here, showing the sales, extent of merchandise purchased, and profits on sales. I have examined the books and accounts and this is the result of my examination. Plaintiffs' Exhibit 18 offered and received in evidence.

I made a summary of these two inventories here, Inventory No. 1 and Inventory No. 2, Plaintiffs' Exhibits "C" and 4. That is of the first and second inventories in detail showing the number of articles and cost price of each. This is the summary showing the class and price of goods in which the second inventory exceeds the first.

Plaintiffs' Exhibit 19 offered and received in evidence.

If a sale of this stock had been conducted between the dates of these two inventories, that is if the first inventory had been taken immediately before the sale

(Testimony of George T. Klink.)

and the second inventory immediately after the sale, then the difference between these two inventories gives the correct number of articles sold in these departments and the cost.

I made an examination in detail of the departments comparing the total number of each article at a given price in the first inventory with those of a corresponding character and price in the second inventory; and the result is set forth in these summaries I have presented to the Court. In so doing I find in certain instances there were more articles of a similar kind at a given price in the second inventory than in the first. I find this condition in respect to every kind of article examined; for instance, suits, pants, overcoats, shoes, hats, sweaters. In fact I find these excesses throughout the entire comparison of the [61] two inventories as far as I went.

The inference of course is that there has been some modification and would call for an explanation by some competent person. I have no means of determining whether the prices in the 2d inventory were raised or lowered from the price in the 1st inventory. Possibly if the defendant's sales slips showed the cost prices they might be of assistance; that is if they showed the cost price of each article. Then if they did show the cost prices I would also have to know whether both their cost and selling prices were true and correct. If I had the correct cost price of every article sold on that sale I could account for these excesses.

In the second inventory the excess articles in the

(Testimony of George T. Klink.)

suits over the first, is 155.

The excess of the pants over the first is 300.

The summaries are in evidence.

For instance take the article of Mackinaw coats in the second inventory, Plffs. Ex. 4, with reference as to whether the prices in the second inventory have been raised or lowered from those in the first. The excess of these over the first inventory is 19. The lowest Mackinaw coat price in the first inventory is $3.25. There were two of these at that price. There were twenty-one at $3.25 in the second inventory.

Mr. OLNEY.—After a big sale of this Bridge merchandise lasting over weeks, Isaacs had more Mackinaw coats at $3.25 at the end of the sale than he had at the beginning?

Mr. SCHLESSINGER.—I object to that.

The COURT.—The objection is sustained.

Mr. OLNEY.—Were there any cheaper coats set forth in that first inventory from which he could have made that excess of 19 by raising prices?

Mr. SCHLESSINGER.—I object to that as not being expert testimony.

Mr. OLNEY.—It is expert testimony.

A. There were no cheaper ones.

Q. Then prices on those coats must have been lowered?

Mr. SCHLESSINGER.—I object to that as being argumentative.

The COURT.—The objection is sustained.

Mr. KLINK.—(Continuing.)

(Testimony of George T. Klink.)

At the Seynei sale the total amount of cash sales were $16,067.94. [62]

The total amount of new merchandise purchased was $6,263.78.

There was $24,353.35 amount of Bridge stock at the Seynei sale at inventory prices.

The amount of stock in all is the total of these two or $30,917.13.

About one-fifth of the entire stock was new.

The total cost of the merchandise sold at the Seynei sale was $14,283.50.

The gain above the inventory cost was $1,784.38.

That was a gain of about 12½% or 13% above cost.

If one-fourth of the new stock sold at a profit of 33⅓% as has been testified to, the profit on the Bridge stock alone was about 10%.

In dollars and cents the profit was about $500 on the new stock, and about $1,200 on the Bridge stock.

The actual amount of profit on the Bridge stock alone was $1,262.40 above its inventory cost.

The defendant reported to these complainants that he had on the fire sale sold Bridge stock for $17,800. If this were sold at a profit of 20%, as has been testified to, the cost of the goods so sold was $14,800, and if we deduct this amount sold at cost prices from the first inventory of $45,974, it gives a balance remaining of $31,000. That is $31,000, would be the amount of merchandise on hand after the insurance sale at cost prices.

The second inventory, made by Isaacs the defendant, only shows $24,600.

(Testimony of George T. Klink.)

The difference between the two is $6,500.

That is to say Isaacs inventory, the second inventory, is $6.500, less than what the actual inventory would be if his purported insurance sale returns of $17,800 were 20% above the original cost prices.

On this basis this second inventory of the defendant shows a depreciation of $6,500.

If the insurance sale averaged more than 20% above cost, this depreciation would be more. [63]

Cross-examination.

Q. Have you examined any books showing sales of 19 days in the store of A. Bridge & Company in making this accounting? A. No.

Q. Have you examined any accounts showing the actual amount of merchandise on hand at the opening of the retail sale and the amount on hand at the close of the retail sale?

A. As represented by the inventories, yes.

Q. Have you examined the slips of daily sales during the 19 days?

The COURT.—He has testified that he examined nothing but the inventories.

Mr. SCHLESSINGER.—Just one question and I am finished: You testified to a profit. Now that profit which you have estimated is based on the cost price of the article and the selling price to the consumer, is it not? A. Yes.

Q. You have not taken into consideration the matter of expense in conducting the sales?

A. In determining the profit, no.

(Testimony of George T. Klink.)

Q. You have not taken into consideration the salaries of employees?

A. As far as my testimony is concerned I did not mention salaries.

Q. Or rents. In other words, your testimony in a word is confined to the difference between the actual cost price of the garment and the selling price to the consumer? A. Yes.

Q. To which you have added freight, or have you added freight?

A. I have presumed that freight is included in the purchase price.

Testimony of Theo. A. Basher, for Complainants.

THEO. E. A. BASHER, called for the complainants, testified as follows:

I am a salesman at 103 First Avenue South in the city of Seattle. I was employed as a salesman during the month of September, 1913, during the fire sale conducted by the defendant Isaacs here of the stock of merchandise of A. Bridge for the complainants; that sale being conducted immediately after the fire. I was employed during the whole sale and recollect the *the* Bridge cost mark with which the stock was marked, which was "Buckingham." I assisted in marking the goods, the shoes only, for that insurance sale. On an average the stock marked above the Bridge inventory cost was marked about twenty per cent (20%) above. I do not remember any being marked below; it is so long ago I don't remember.

(Testimony of Theo. E. A. Basher.)

A large per cent were marked above the Bridge cost prices, about half I should say. Everything was reduced from the ordinary price. The goods were all marked down as far as I remember.

Q. Marked down from what?

A. From what is the ordinary price.

Q. Were any marked down from the original cost price? A. No.

A large part of the stock was sold above the original cost mark. The goods were sold according to the prices put on them. There was no [64] stock sold at wholesale. So far as I know the stock was sold at retail piece by piece over the counter. The insurance sale held up all right throughout the three weeks and in my judgment was a successful sale. I was with Bridge 6 yrs. before the fire. After a clean up sale six months before the fire some new stock came in.

I was employed by H. C. Seynei & Co. during the sale of the balance of this Bridge stock during October and November, 913. That sale occurred immediately after the insurance sale at the same location. The same prices were left on the goods as at the insurance sale; they were not re-marked.

About ninety (90) per cent of the stock was undamaged.

I was paid in cash, $25 per week, but gave no receipt.

Cross-examination.

My special experience has been in the shoe line and I have confined myself entirely to that line. I

(Testimony of Theo. E. A. Basher.)

have no particular knowledge or experience as to the value of other kinds of merchandise. I have no idea as to the amount of cash taken in at the sale or the amount of expense incurred and my idea of the success of the sale is based upon the fact that large crowds of people came in and went out after apparently making purchases. At the insurance sale the best of the shoes went first—the good sizes.

In the whole store about ninety per cent of the stock was in good shape and undamaged by the fire. I mean the whole stock. That is what it averaged. It did not damage more than ten per cent the shoe stock alone.

Testimony of J. O. Johnson, for Complainants.

J. O. JOHNSON, called for the complainants, testified as follows:

I am a salesman at 103 First Avenue, South, in the store of Carl Schirmer in the city of Seattle. I was employed during the fire sale in September, 1913, conducted by Isaacs of the merchandise of A. Bridge for the Insurance Companies immediately after the Bridge fire, [65] I came in the day before the sale started; it was on Friday and the sale started on Saturday; and I remained with him until the end of the sale. I recollect the Bridge cost mark with which the stock was marked. It was "Buckingham." The clothing stock was all then marked. I did not assist in the making and so far as I know a man named Jeremy marked it.

Of the merchandise marked above I should say it

(Testimony of J. O. Johnson.)

was marked 10% to 15% above the Bridge cost price on the tags. I occasionally sold in other departments than the clothing department when busy to help out. To the best of my knowledge the goods were sold according to the sale prices on them for the fire sale. There was no stock sold at wholesale that I know of. To the best of my knowledge it was all sold piece by piece over the counter at retail. The insurance sale apparently held up well during the three weeks and in my opinion was a successful sale.

I was employed by H. C. Seynei & Co. during the sale of the balance of the Bridge stock. As I remember the same prices were left on the goods. I was paid in cash, eighteen dollars a week.

Cross-examination.

In a sale like the insurance sale naturally the best stock will go first. After the sale had stopped the sizes were pretty well broken, all sold down. All the clothing was exposed to sale. Everything was offered indiscriminately in the store. In a fire like that which took place in the Bridge store the clothing is more susceptible to damage by smoke or water or fire than any other merchandise. The odor and smoke will stay with the clothing. In one way or another I should say the per cent of damage to the Bridge clothing was about ten (10) per cent.

Testimony of William J. Meyer, for Complainants.

WILLIAM J. MEYER, called for the complainants, testified as follows:

I am employed by the United States Rubber Company at 216 Jackson Street in the city of Seattle. I was employed during the fire [66] sale in September, 1913, conducted by this defendant of the stock of merchandise of A. Bridge for the Insurance Companies immediately after the Bridge fire. I was employed from the start of the sale until the end, the wind up; during the entire period of the sale. I recollect the Bridge cost mark; it was Buckingham.

I assisted in marking the goods for this sale. I marked the furnishings and hats. I had been with Bridge about six months before the fire. I also helped mark some of the pants.

Q. How was the merchandise to which you refer marked with reference to the Bridge cost price, above or below? A. Above cost.

Q. What per cent above cost?

A. Well, to my recollection now, I would imagine about 15 per cent, probably a little better.

None in my department was marked as high as 25% to 30%. All that I know of that stock of merchandise sold above cost price. During that sale I sold all over the house, in other departments than my own. The sales in those departments in regard to the cost mark on the Bridge cost prices kept approximately the same as the furnishings; that is all above cost.

I was paid in cash out of the drawer but signed

(Testimony of William J. Meyer.)

no receipt. To my knowledge there were no goods sold at wholesale but the stock of merchandise was sold piece by piece over the counter at retail. The last week it fell off considerably. I should say on the whole it was a successful sale.

I was employed by the Seynei Company during the sale of the stock immediately after the Bridge sale. On that sale the same prices were left on the merchandise as on the insurance sale. The prices on the Seynei sale were about the same as on the insurance sale.

I was with Bridge during his sale some months before the fire. It was a clearance sale and the odds and ends and remnants of the stock were sold off at that sale some months before the fire occurred. I don't remember the prices on that sale. That clearance sale was a successful [67] sale and after that sale new stock came into the store.

Cross-examination.

I am absolutely sure that every item that goes under the heading of furnishings, hats, pants and underwear, was marked above the Bridge cost. The stuff that was burned and water-soaked was marked below, but the stuff that smelled badly and was smoked was not cut down below cost. Fifty cent garments at retail prices sold for I think 33 cts. No underwear was sold for less than 33cts, a garment. The damaged—burned and water-soaked shirts and collars were sold as low as 15 cts. At the beginning of the sale the collars sold four for a quarter; it seems to me they were afterwards re-

(Testimony of William J. Meyer.)

duced to six for a quarter. Collars are $1.20 a dozen. now. About five per cent of the hats were reduced. There were not enough caps in the stock to bother with, we sold out two or three dozen caps. In all sales there is a great demand for handkerchiefs; the cheaper ones were marked below cost as leaders. Socks were not sold below cost. Towards the end of the sale there was a cut in just a few odds and ends in my department. Overalls sold at a considerable cut; they were sold at 59 cts. a pair at first and then they were raised, I think the second week. Thus there was a readjustment in the marking of the overalls. I said it was a successful sale because lots of people came in and went out having made purchases. I have known of sales where great crowds of people have come to purchase and yet it was perhaps a loss in the end. Not having the figures I cannot state whether or not the sale was a success. After the fire sale had stopped, and before the place was opened up under the name of Seynei, new goods came into the store and improved the stock.

Redirect.

As a rule the merchandise that I have spoken of as having been sold at a reduction was either damaged stock or stock sold as a leader. [68]

Testimony of J. Lester Esch, for Complainants.

J. LESTER ESCH, called for the complainants, testified as follows:

I am manager of the safe deposit vaults of Wm.

(Testimony of J. Lester Esch.)

D. Perkins & Co., private bankers in the city of Seattle, at 211 Cherry Street. As such I have possession and charge of the records of such safe deposit boxes, the names of the owners and the visits made by the owners to their boxes.

On the 6th of September, 1913, D. Isaacs rented a box of us. I have the records showing the times and dates he visited the safe deposit box during the month of September, 1913. The times and dates of his visits to that box during the month of September, 1913, were as follows:

September 6th, he entered the box twice, 9:30 A. M. and 5:02 P. M.

September, 9th, 3:28 P. M.

September 13th, 6:55 P. M.

September 15th, 10:02 A. M.

September 20th, 7:38 P. M.

September 22d, 10:12 A. M.

September 27th, 7:38 P. M.

September 29th, 12:14 P. M.

Testimony of Alexander Bridge, for Complainants.

ALEXANDER BRIDGE, called for the complainants, testified as follows:

I reside in the city of Seattle and was the owner of the stock of merchandise there which is referred to in this cause, at 103 First Avenue, in 1913.

Immediately after the fire that stock consisted of clothing, furnishings, hats, shoes, blankets, and all that stuff. It was mostly a staple stock. For instance the hats would be mostly Stetson hats. Be-

(Testimony of Alexander Bridge.)

ing down below, I am speaking of the store where the fire occurred, [69] we did not carry anything but regular stock. The shoes were Douglas shoes and we carried a line from Smith in Chicago; Chippewa shoes and Birch shoes, and all such stock; and also rubber goods. The rubber goods were also staple stuff and we filled in as we went along. We never had much odds and ends. We never looked for any jobbing of any kind. I have been in business since 1892 or 1893.

In the taking of the inventory after the fire we did not add the freight. That should be added to the cost price in the inventory. That inventory also does not take account of and show the discounts. The total value of my stock after the fire was over fifty thousand dollars.

After the fire I assigned my stock of merchandise to Mr. Truax as the representative of the bank for the benefit of my creditors. He disposed of my stock of goods for $34,000 to the complainants without my consent. As an individual I would never have sold that stock at that time for that amount. I now have a suit pending against Truax for so sacrificing my stock; this same stock of merchandise. That suit is now pending for $75,000 for sacrificing this same stock of goods in selling to these companies for $34,300.

I could have sold this stock myself after the fire at a retail fire sale on the same premises, where I had been known for years to the public, at a profit above the inventory cost price; I figured I could

(Testimony of Alexander Bridge.)

sell it at 15% to 20% above the price named in this inventory, Plffs. Ex. "C." That stock was in fairly good condition and there was some new goods amongst it. I had just a few months previously got through with a big sale and cleaned up and replenished the stock with new merchandise in the neighborhood of $20,000, filled in.

It was my custom to pay cash and discount my bills and so reduce the cost of my merchandise; so the prices in this inventory, Plaintiffs' Exhibit "C," do not include the discounts.

I have knowledge of the sale by Isaacs as trustee for these companies. I had my office during it upstairs in the store and I came [70] in every day during the course of that sale for my mail. I have knowledge of how the goods of that stock were marked and sold on that sale. Nothing was sold below the cost mark in this inventory. There was some stock sold at a fairly good profit; some $7 and $8 suits marked at $12.33, $14.75, and as high as $17.88; $10 and $11 suits for $17.85. There was four or five hundred suits that I bought one time for $2 or $2.50, and these suits were sold cheap—at $3 or $4. They were boys suits. They didn't make much profit on them.

During the sale there was a big force of salesmen. It was a terrible sale; the biggest business that was ever known in Seattle. I personally saw the tags. My original tags and cost prices were left on the stock during the defendant's sale for these insurance companies. It looked like a highly successful

(Testimony of Alexander Bridge.)

sale to me. Before the close of the sale and the sale of the balance of the stock by Isaacs to himself he stated to me and to everybody that he had then taken in his guarantee and expenses. I heard him say so several times in that store on several different occasions during that sale.

On my clearance sale prior to the fire to which I have referred I realized 20% to 25% profit above cost. At that sale I sold off the odds and ends and cleaned up my stock principally.

As a business man of long experience I would say that one day's notice of sale of a large stock of merchandise in bulk, such as my stock, was not sufficient and conducive to obtaining the best price for the seller. I had people myself who wanted to bid on that stock. When we came in, that was in the morning, the thing was all over; it was all over before noon. I came in with friends of mine who figured to put me in business. I had no chance at all.

In order to save a few hundred dollars of running expenses I would not have sacrificed several thousand by selling this stock in bulk in haste with only one day's notice to the public. The defendant could have advertised this sale in bulk in the papers while the retail [71] sale was going on. The whole thing looked to me like a frame-up because I was concerned in that stock as much as anybody and I absolutely had no chance; it looked to me like a frame-up proposition. My reason was I had the fixtures there, worth about $5,000, and I thought I had a chance to get back into business for which there

(Testimony of Alexander Bridge.)

were people who wanted to stake me.

Cross-examination.

I made the assignment to Mr. Truax, the credit man of the Seattle National Bank for the benefit of my creditors. At that time I owed in all $44,000, but not that much for merchandise, of which amount $15,000, I owed the bank. The sale that I had before the fire was in February; I was trying to raise money from that sale in order to pay off the bank. The store was closed after the fire when the assignment was made. Truax never ran the business at retail. Mr. Mason was never selected by me to adjust the loss. He was chosen by Mr. Truax, the bank's credit man. I don't know regarding either the honesty or competency of Mr. Mason. The inventory that was taken is correct so far as it gives the original cost of all the goods that were in the store, less the freight and discount.

Testimony of George H. Bailey, for Complainants.

GEORGE H. BAILEY, called for the complainants, testified as follows:

I am an attorney at law and have been practicing as such for the past twenty-two years and was so practicing my profession in the State of Washington in Seattle during the months of September, October and November, 1913. I know the defendant, D. Isaacs. I first met him in the store of A. Bridge & Co., on First Avenue in Seattle, I think about the ninth day of September, 1913. He was in charge of the sale for the complainants of the stock of A.

(Testimony of George H. Bailey.)

Bridge & Co., at that time. In Seattle during that month of September, 1913, I had conversations [72] with the defendant relative to how the sale was going. I was in the store frequently during the period of the sale and had conversations with Mr. Isaacs as well as Mr. Seynei, who was in charge of the sale under Mr. Isaacs. He was really in charge of the help.

As near as I can recollect the substance of these conversations with the defendant relative to how the sale was going, were about as follows: Mr. Isaacs said on different occasions that the sale was going very successfully, that it was going beyond his expectations both in volume of goods sold and in the prices received. Conversations to this effect were frequently held every day or two during the period of this sale. What I have just said covers only the period of this sale in September, 1913, and prior to September 27th, the date on which, as I remember, the sale closed. I had two conversations with Mr. Isaacs during the last week of the sale in which he stated, first, during the forepart of the week, that the sale had gone very favorably; that he was going to get out of it, probably that week, his guarantee, expenses and commissions. Later, on Saturday, about the middle of the afternoon, on the 27th of September, I was in the store and I asked him if the sale had reached the point that he had prophesied earlier in the week, and he stated emphatically that it had; that it had paid all his guarantee, expenses and commission, which was very

remarkable. He further stated that the best part of it was that they had gotten unusually good prices; that they had gotten above—in fact in other conversations during the month, he had stated that he had been getting above original cost prices for the goods. But, as stated, on that afternoon, the 27th, the sale was a complete success and he was beaming with satisfaction over the results. He was elated over the result of the sale and went on to speak of his ability in handling these things, that he could get more out of them, as was shown in this particular case, than others usually could, and he was really lauding his own ability to me to some extent as well as the success of this [73] particular sale. He said that they had received nearly or about 20% above cost; what he meant was the cost to Bridge, that was the cost he was speaking about, not the cost to him; he was speaking about the cost price, the original cost. The statement was clear and emphatic that he had made good his guarantee and expenses of that sale before the close of the retail sale on that day.

This insurance sale was conducted within three blocks of my office in Seattle. The number of people was always great in the store. They had to have police help to handle them, and the storeroom was full of the public examining or purchasing, or both, as is always during all of these sales, except, perhaps at some special hours of the day. It was my habit to go down in the morning, as a rule, and see how things were coming along. I am not a merchant

(Testimony of George H. Bailey.)

and my opinion or knowledge of the sale was obtained from observation of the crowds, the amount of goods going out and the statements of Mr. Isaacs and also Mr. Seynei in regard to it. Based upon that I think it was an exceptionally successful sale. These statements of Mr. Seynei were usually made when he and Mr. Isaacs were together. There were several times when statements to the effect that the sale was successful and they were getting a good price for the goods were made by Mr. Seynei in the presence of Mr. Isaacs, in which Mr. Seynei turned to Mr. Isaacs to O. K. the statements to me, which he did.

I had other knowledge than the statements of the defendant and Mr. Seynei as to the prices they were receiving for the goods. I was there when Mr. Basher was complaining in regard to not being allowed to get as much as he thought he was entitled to for some shoes. He stated that that particular shoe, or brand of shoes, could be sold at a better price and he took it up with Mr. Isaacs, saying that the shoes would all be gone and when they could be getting more money out of them. I do not know the result of their conversation; that was the only statement I remember as to any particular person remarking about the sale. But he remarked that at the prices they were getting they were going to sell out the shoes and that they had better raise the prices. Basher was the clerk in [74] charge at that particular time of the shoes. These statements were all made to Mr. Isaacs.

(Testimony of George H. Bailey.)

I do not know the number of salesmen employed at the retail sale. I would say from two dozen to forty some, both men and women. They varied to some extent. There were other salesmen, in the clothing department, that I knew, that stated to me that the sale was going well and successfully. If I remember rightly one of their names was Meyer, and I do not think I remember the others. The remark was made to me by at least three of the salesmen in the clothing department, they were even selling at above cost while advertising below the Bridge inventory cost prices—that they were advertising to sell below cost and were actually selling above cost. That statement was made by Meyer and at least two others.

I had knowledge and observed another sale of the balance of that same Bridge stock of merchandise after the close of that first retail sale. I had the same knowledge obtained the same way of the two sales. The subsequent sale was made and conducted by Mr. Seynei or really Seynei & Co., which comprised Seynei and Isaacs. This subsequent sale was conducted in the same building without moving the goods. From my personal observation and knowledge the insurance retail sale by the defendant for the complainants was successful as the subsequent sale by Seynei & Co. My memory is that the insurance company sale was at a little higher prices during that period.

The balance of that stock was not all sold in that subsequent Seynei & Co. sale. The stock was sold

(Testimony of George H. Bailey.)

in bulk on September 29th, by Isaacs to himself, or rather Seynei & Isaacs. Isaacs prepared the bid and Seynei presented it to Isaacs for the goods which were then turned in to Seynei & Co., and the subsequent sale conducted by Seynei & Co. was continued through October and, as I remember it, up until about the 20th or 22d of November. I may be a little mistaken as to the date when they closed, but they were not allowed to hold the room any longer [75] and boxed up the stock—moved it out.

The defendant and Mr. Seynei had made their agreement to enter into partnership during the period of the insurance sale, had then agreed to purchase this stock and go into business as Seynei & Co., in which no one would be interested but the defendant Isaacs and H. C. Seynei. That partnership was continued during the later sales and disposition of the goods. A written partnership agreement was prepared but never signed by the parties.

Regarding the sale by the defendant of the balance of the Bridge merchandise in bulk to Seynei and himself as partners; Isaacs advertised on Sunday that the sale would take place Monday of the goods in bulk, as I remember, about eleven o'clock, the business would be open. This was the Sunday and Monday following September 27th, 1913. I did not know at the time but afterwards found that the advertisement was inserted in the *Seattle Times*. The defendant did not appear publicly as a bidder in his own behalf. The bid was made in the name of H. C. Seynei; and on the following Monday the sale

(Testimony of George H. Bailey.)
was made in the name of H. C. Seynei as purchaser, as I have stated.

In my opinion as an attorney of considerable experience with regard to one day being sufficient notice for such a sale in order to give all the bidders a chance in justice to the owner of the merchandise, I would say: The nature of the goods was such and the conditions pertaining to the handling of the goods, that they had been retailing from the stacks, boxes and counters of these goods right up to Saturday night and made it impossible for any prospective bidders to know anything about either the quantity or the value of the goods in the store Monday morning by eleven o'clock in sufficient detail to make an intelligent or safe bid.

As I had been told this sale in bulk was coming off Monday morning, by Mr. Isaacs, I went down at that hour and was there when the bids were opened. Two men whom I did not know were complaining to Mr. Seynei that they would like to have bid had they time to examine the [76] goods before the bids were opened, but could not do it. I do not know how many bids were in, nor what any of them called for, but a few minutes afterwards Mr. Seynei came back and told me he had got the goods but that he knew he would all the time.

Before I left the store at this time Mr. Isaacs told me that "We have got the goods and they are all in perfect shape. Now we will put on a sale and make plenty of money."

From my experience as an attorney my knowledge

(Testimony of George H. Bailey.)

as to the customary time for advertising such a sale in bulk is from three to fifteen days.

Cross-examination.

I never had, nor have now, nor at any time, any interest in this action at all. Never heard of it until recently. I have never or at any time or now represented any of the complainants. I know Mr. Jesse Olney. I have had nothing lately in which he was interested, except the case of H. C. Seynei versus the defendant in this case, that I know of. That action was prosecuted by me against the defendant on behalf of Mr. Seynei and related to the same subject matter involved in this action. For two or three years prior to the incidents related to in this matter, I was Mr. Bridge's attorney and acted as such up to the time he made the assignment to the Seattle National Bank. I think that assignment was after the fire. I then represented Mr. Bridge in the preparation, I think, of the notices and served them on the agents or adjusters of the complainants and, if I remember rightly, that was the last thing that I ever did as attorney for Mr. Bridge. I afterwards represented Mr. Isaacs in a case in relation to the lease of the building in which these goods were sold during the sales mentioned. I became the attorney for Mr. Isaacs and Mr. Seynei, or Seynei & Co. later.

As I have said I have at different times represented Mr. Bridge, Mr. Seynei and Mr. Isaacs. I never represented the assignee of Mr. Bridge; I had no connection with the sale in bulk in any way; my only connection with Isaacs having been in the case

(Testimony of George H. Bailey.)

of the Gatzwett Schwabacher Land [77] Co., in which suit was brought as I have said. That was for Mr. Isaacs and Mr. Seynei. I do not think I had anything to do for them until early in December. As I have said I have had nothing lately in which Mr. Seynei was interested except the case of H. C. Seynei against the defendant in this action. In that action we were pursuing the partnership property of Mr. Seynei in this same property which Mr. Isaacs the defendant in this case later denied and which we substantiated in this same court in San Francisco. The judicial determination of that case was in favor of Mr. Seynei and settled by the defendant in this action.

I do not remember even of having been asked a question by Mr. Isaacs in regard to these companies, nor anything pertaining to the insurance business when he was there. When he first came he indicated to me that he was such a high up representative of these complainants that he dealt only with the heads of these companies and the head representative at San Francisco; that he was above all the other adjusters and had nothing to do with them.

During the insurance sale, Mr. Seynei talked with me relative to whether he should go into partnership with the defendant and advised with me regarding it. I represented no one as attorney until as I have stated. The partnership between Mr. Isaacs and Mr. Seynei came into being during the insurance sale, or they made their agreements—and they further in my presence, discussed or stated that they thought

(Testimony of George H. Bailey.)

they were going to go into business as Seynei & Co. Mr. Isaacs stated that he was satisfied, from what he had seen of Mr. Seynei, that the latter had ability to handle his business; that he wanted to establish his business there, and that they were going to commence it on this stock. That conversation took place during the latter part of the insurance sale, probably the last week. They did not confer with me in regard to anything. I was down there looking around, watching how the business was going and they stated—never advised with me in any way, either as their agent or attorney—but, as stated, the conversation that I have given you, Mr. Isaacs had the floor, as he usually [78] did when they were together,—he was going to establish this business and take Seynei in as a partner. There was no conference. It was Mr. Seynei who introduced me as a friend and he was speaking to a friend, telling him the matter of their mutual interest at that time. I had not been paid for my services to A. Bridge & Co., and I was interested in knowing how soon money would be paid and settled and was a little watchful on my own account. I was not there on any other purpose and simply on a friendly interest in it on account of Mr. Seynei. The fees that were due me were not particularly to be paid out of the insurance money; the insurance money was pretty well taken care of at that time by claims of creditors who were pushing the estate harder than I was willing to push it.

The Bridge estate, as represented in the assign-

ment, consisted of some 1,900 acres of land in different tracts in the State, two or more apartment houses and some residences in the City of Seattle, all of supposed value, at that time, from $100,000 to $200,-000. The insurance money was not even the largest part of the estate, but it was the ready cash paid at that time. The whole conduct of the whole estate has been a matter of interest. There never has been a time when that interest has been ended, I am very sorry to say, and the interest was connected only with my interest therein, and the changes that were taking place.

I do not know whether the insurance companies had made settlement with the assignee before the sale commenced. There was a dispute over the lease. The last statement of Mr. Bridge considered the lease as a liability instead of an asset.

On Saturday, September 27th, Mr. Isaacs informed me he was going to sell the stock in bulk, and I asked him why. That was the first intimation I had as to the capacity in which he had been working. I went to the store probably three or four times a week during the sale; that was purely out of my friendship for Mr. Seynei, who, at the time, I did not represent; and seeing how things were going, and making trifling purchases [79] now and then. My interest in seeing how the sale was going was nothing more than that beyond my interest in it through Mr. Seynei.

Q. That small interest took you to the store at least three times a week and caused you to make

(Testimony of George H. Bailey.)

these observations and careful inspection?

A. That is true. At that time Mr. Seynei and I were very close friends, and I was very much interested in helping him and was looking after the lease for him, trying my best to obtain it from the owners. I was not particularly interested in securing my fees from the sale only as to the speed with which I might get my money. I never doubted but that I might sometime get it. I have not got it all yet, neither has the estate been wound up. I had advised the assignment to the bank in the first instance.

I usually went down in the morning. Mr. Isaacs was usually there and I would have a talk usually of from one to several minutes, usually just a few minutes, in regard to things, and before going round to the office, and at that time neither Mr. Isaacs nor Mr. Seynei were busy. Then at other times I would perhaps come in with a friend, or someone like that. At that time this was the largest sale in that part of the State and it was things that men were all interested in. I have not that same friendly feeling toward Mr. Isaacs at this time; not since he tried to rob Mr. Seynei of his interest in the goods, which was established in this court. Mr. Isaacs never had possession of the building. I would not be able to state definitely at this time as to so many words that Mr. Seynei heard in our conversations, and how many words he did not hear, but when all three were present it was usually Mr. Isaacs who was doing the talking. If you knew Mr. Isaacs, you would appreciate that fact. I know that when they opened the

(Testimony of George H. Bailey.)
sale and for some time thereafter they had to have a doorkeeper to close the door to prevent the building from becoming overcrowded.

It was on Saturday that the defendant told me he was going to sell the stock in bulk. I knew the goods for sale on Monday were the goods handled by Mr. Isaacs during the insurance sale [80] from the reason there were no other goods. On Monday he sold the goods in the store and that was what was advertised on Sunday. I knew Mr. Seynei expected to get the goods but I did not know how they were going to do it. He had before that time told me what Isaacs had offered him. On Monday, the day of the sale in bulk, when Mr. Seynei told me that he had the goods and would make plenty of money, Mr. Isaacs was present. Mr. Seynei was there and I remarked that it would be a pretty good joke if someone else had come in at that point when they had agreed on their partnership, and bid in the goods, that is, put in a bid over Seynei; and Mr. Seynei laughed and said that could not very well happen, Mr. Isaacs knew what to bid and gave it to him to put in. That was in Mr. Isaac's presence. I do not know whether there were other bids submitted for the goods. I think there was one or two others. I don't know that there was any competitive bidding but I think so.

In detail I am unfamiliar with the amounts realized upon the sale of the merchandise in question and the account or accounts of Mr. Isaacs and the complainants in this case. I know that he sold the

(Testimony of George H. Bailey.)

goods for a great deal more than he guaranteed the insurance companies. That is admitted by Isaacs and Seynei both in the Seynei case in their testimony. They made such admissions to me and to this Court. I am not speaking about the insurance sale being twice as much or more, but that they sold the goods for very much more. My memory is that at the insurance sale Mr. Isaacs' statement was that he had sold his guarantee, expenses and commissions, that he covered all of that, and sold some $16,000 worth of the goods by Seynei & Co. I say $16,000, possibly it was $15,000 that they boxed up; and it was a greater sum, some $23,000, that they sold, a very great deal more at these various sales over and above expenses than was paid to the insurance companies. [81]

Testimony of E. K. Reiley, for Complainants.

E. K. REILEY, called for the complainants, testified as follows:

I reside in Seattle and am the Auditor of the Seattle National Bank. I have charge of the books of the bank containing the accounts of the various depositors. These books contain the amount of the defendant in this case. The account was opened September 5th, 1913. I have prepared from the books of the bank a statement of account of the defendant showing the deposits and withdrawals of that account, Plaintiffs' Exhibit "D."

There is only one instance that I can locate from our books where the defendant purchased a draft

(Testimony of E. K. Reiley.)

on San Francisco. That was on November 15th, 1913. On that date he purchased a draft for $7,350 on the Crocker National Bank of San Francisco, payable to D. Isaacs. I have it here. It bears the endorsement of D. Isaacs and Naomi Isaacs. Also bears the endorsement of the German Savings & Loan Society, A. H. R. Schmidt, Cashier, in which they endorsed it over to the Crocker National Bank and was charged to the account of the Seattle National Bank. I should say this draft was deposited in the German Savings & Loan Society by Naomi Isaacs. **[82]**

Testimony of J. R. Mason, for Complainants.

J. R. MASON, called on behalf of the complainants, testified as follows:

I am an adjuster of fire losses, residing and having my office in the city of Seattle, State of Washington. I make business examinations of stocks of merchandise and place values on them and am an expert in estimating the value of merchandise losses by fire, having been in the business about six years. I was employed as such by Bridge's assignee to adjust the loss of A. Bridge in his store in Seattle after the fire there, August 11th, 1913. I caused an inventory to be taken of the stock at that time. Everything in the store was put in that inventory. This is the inventory, Plaintiffs' Exhibit "C."

Q. Have you the inventory, Mr. Mason?

A. I have the original here, yes.

Mr. OLNEY.—Witness produces inventory taken

(Testimony of J. R. Mason.)

after the fire on August 11th, 1913, at the Bridge cost price; and we offer it in evidence.

Mr. STERN (Defendant's Attorney).—No objection.

This so-called recapitulation (Defendant's Exhibit 1) is not a part of the original inventory of the goods. It was made following the conclusion of the inventory and was a recapitulation in quadruplicate copies. My recollection is that the inventory amounted to about $46,000. I examined the stock of goods after the fire and the claim I originally made up was approximately $18,000. My final claim was $16,200.

Q. Did the insurance companies, these complainants, refuse to pay $16,200 for the damage to the stock?

A. They disagreed with me as to the amount.

Q. Did they refuse to pay it?

A. They refused to pay it; refused to accept it.

The insurance companies proposed to agree with me on a sound value and take the entire stock. I made a counter offer to the insurance companies of $36,000, at which price I was willing to sell them the stock. I made no offer of $38,675. That amount was the estimated sound value of the stock shown in my statement of loss and I consider that a fair price, and it was based upon an estimate made by two capable merchandise men in the city. It was not intended as a price at which I would submit the stock for sale; it was for the purpose of adjustment, to ascertain the amount of the losses. The first step

(Testimony of J. R. Mason.)

being to find out the sound value of the goods. [83]

Q. Did you finally compromise on a cash sale price to these insurance companies, these complainants?

A. Yes.

Q. What was that cash sale price?

A. My recollection is it was $34,300.

In taking into consideration the acceptance of that amount as a compromise, the fact of another month's rental being imminent, some $920, and the saving of that rental, entered in. That rental was due in a few days. There was also the condition existing that the creditors of Bridge were asking for their money. I also took very largely into consideration the fact of Bridge's inexperience with fire sales. At that time I was acting for the assignee of Bridge's creditors and I was very largely satisfied that Bridge, on account of his inexperience, would not be able to obtain as good results from handling the stock. Some time ago I heard from Mr. Truax that Mr. Bridge was threatening to bring suit, claiming the stock was sacrificed at that figure ($34,300).

If I had been free to use my own judgment entirely I do not think I would ever have accepted $34,300 for that stock; but I was acting under instructions on the closing of that sale. The least I would have accepted would have been $36,000.

It was a staple stock. I consider a stock in competent hands handled as a fire salvage stock would yield anywhere from 25%, 30%, 40%, or possibly 50% above its actual value. The first day of the retail sale the defendant told me the proceeds were

(Testimony of J. R. Mason.)

something like $4,000. He spoke very optimistically of it.

Q. Mr. Mason, from your knowledge of this stock after the fire and at the time of the Isaacs' sale for the complainants of that stock in your city, and taking into consideration Isaacs' expert handling of fire sales, is it your judgment that the stock should have sold at retail at the inventory prices, which were the cost prices?

A. It should, in my judgment, be sold at retail at prices approximately inventory value; of course, less damaged goods. The best should have sold way above inventory; naturally the best sells first.

An estimated loss does not necessarily mean a complete loss. A clever salvage man such as the defendant can take a damaged stock and recondition it and reduce the estimated loss. I would not say he could reduce it 50%, [84] I would expect him to minimize the loss materially.

As an experienced adjuster and one acquainted with sales of this character, I would say one day's notice of sale of such a large stock of merchandise in bulk was not sufficient nor conducive to obtaining the best price possible for the owner. Such short notice would prevent any large number of competitive bids. I do not consider the defendant's notice of the sale in bulk sufficient time to allow outside bidders a chance to examine the stock. I do not consider such notice conducive to obtaining the best price possible for it. A notice of a week or ten days would have been better and more customary, assuming that there

(Testimony of J. R. Mason.)

were other available buyers than those who were already informed of the sale; I do not consider that such short notice of sale was fair to these complainants.

Taking into consideration the fact that the defendant as the complainants' broker was contemplating the purchase and buying in of the stock for himself, and did buy it in for himself, I do not consider such short notice fair to these complainants in obtaining the best possible price for their merchandise. If it appears that the broker in such manner buys in the stock of merchandise inventoried at some $24,000 cost price in bulk for himself at $9,000, I would not consider that his employers, the owners of the stock, had been fairly treated or received a square deal.

I presume in so buying the stock the broker would certainly expect to resell it at a profit. In such case where a broker purchases stock in bulk for himself and sells it at a profit for himself, the conditions being equal, he should have continued the sale at retail for the owners of the stock, and they should have had the profit.

Cross-examination.

That inventory of $46,000 did not fairly represent the true, sound value of the stock at the time it was taken. My judgment of the sound value after making proper allowances for depreciation was $36,000. The adjuster for the insurance companies placed it at $33,000. By negotiations we finally compromised on $34,300. I was acting under [85] instructions on the closing of that sale to the companies. I did not

(Testimony of J. R. Mason.)

get within $1,000 or $1,500, of what I would have insisted upon or gone into an appraisement in settling the amount of the loss. I would not have disposed of it for less than what I thought the stock was worth if I had not been forced to do so. I thought on the whole I was doing pretty well for my client. I did better than my instructions. Naturally the best class of merchandise of the entire stock sells first, unless you take it out of sight where the customers cannot see it; and a time comes when the sale must be suspended and the balance sold in bulk. One method is to sell at public auction. If the representative of the insurance companies had been advised of the sale before hand at sealed bids, and that the salvage man himself put in a sealed bid, to protect the stock from being sacrificed, I think that would protect them. I still think it unfair if a broker sells to himself $24,000 worth of merchandise for $9,000, unless he can show he has given notice to the owner and has the owners' consent. A broker has no right to bid without the authority of his principal. I consider 45% a reasonable price for the remnants of that sale, if they were the average remnants such as would follow a retail sale, all broken lines or badly damaged goods, such as would naturally be left by buyers. There were lots of buyers in town here at the time this sale was going on ready to bid on short notice and who kept in close touch with a stock of goods and were in a position to make a quick bid. The question of character and length of notice to be given buyers is influenced by various condi-

(Testimony of J. R. Mason.)

tions. Where a sale breaks down to a point where the cost is 50% to do business, it would be advisable to hurry a sale in bulk through as quickly as possible. Any notice that would be sufficient to assemble a requisite number of responsible buyers and competitive bidders would be fair, and I would say that such sale was conducted under such circumstances as made it probable that as much had been realized as might have been if there had been a more extended advertisement in the newspapers.

Redirect Examination.

If a party who conducts a sale is thinking of buying in half of the [86] stock himself after selling first half, the temptation would be present very strongly to sell off the poorest first. An advertisement run once would not attract many buyers. Knowing Mr. Isaacs as an expert in fire sales I consider that if he bought this stock at $11,000, he would expect to make a profit; and to that profit you would have to add expenses to arrive at the actual value of that stock. If a similar sale was conducted at a profit by Isaacs immediately after the first sale, I would not say all things being equal that sales could be dropped to such an extent as counsel says. If the balance of the stock sold in bulk was more than half the stock, it could not all be remnants; of course, the lines are broken. I consider $11,000 a fair valuation of a stock, the other half of which sold at retail for $17,800. That is just about the usual per centage of profit at a retail sale—not a fire sale. I never saw the stock later than a day or two after the insurance

(Testimony of J. R. Mason.)

sale opened. If the same stock sold at the same place at large profits, I would consider it to be a pretty well-preserved stock if it had not been filled up. If the best of the stock was sold at the insurance retail sale, it should have brought very good prices, away above the inventory cost; and if the defendant's statement shows that that brought 25% below I would be disappointed in the returns. I would consider the sale very disappointing.

Recross-examination.

My judgment of the best method of attracting bidders is to communicate direct with the buyers. When I seek a buyer I telegraph to Portland and San Francisco. An advertisement in the newspaper does not reach the Portland and San Francisco buyers; local buyers know all about it anyway. Where a stock is turned over to a salvage man for sale either under a guarantee or commission my experience is that the expectations of the insurance company are very disappointing. I knew this stock well at the time it was turned over to the insurance companies. It was a staple stock. I consider this stock should have brought approximately the inventory value. I should say that if $18,000 worth of merchandise sold at retail the remaining stock under ordinary conditions would be the most damaged part [87] and the less salable. There was a small portion of it not identifiable; it might be anywhere from three to seven hundred dollars. The reason it could not be identified is that it was burned and obliterated. I think it was all on one or two tables and was inventoried from

(Testimony of J. R. Mason.)

memory by a clerk. He put it in the inventory, but it was of no value. I never heard that there were any goods there that were not inventoried. I inventoried everything that was in the store, that is, all that I knew about. **[88]**

Testimony of George C. Main, for Complainants.

GEORGE C. MAIN, called for the complainants, testified as follows:

I am a fire insurance adjuster, residing in the city of Seattle, in the State of Washington, my office being located in that city. I was employed to adjust for the complainants the Bridge loss in Settle, Wash., after the fire there August 11th, 1913. I examined the damaged stock of goods after the fire. Very little was actually damaged by fire. Practically all of it was damaged more or less. The maximum that I was willing to allow the assured on account of damage was between $13,000 and $14,000. Bridge, the assured, claimed something over $18,000 as his loss. The final claim was $16,200. I could not agree with the assured as to the loss so I worked down the valuation of the stock as low as possible for the complainants to take over the stock in bulk, at as low a valuation as possible as a speculation, expecting them to realize a substantial gain on it at retail over and above the amount we could have adjusted the loss with the assured at; otherwise there would have been no object in taking it over. Bridge's adjuster placed a value of some $38,000 on the stock. Finally by way of compromise only, I succeeded in getting the price

(Testimony of George C. Main.)

down to $34,300, and the complainants purchased the stock for that amount from Bridge's assignee. I refused to pay $16,200 claimed as loss by the assured because I thought by buying the stock for cash in bulk wholesale the loss could largely be reduced by sales at retail. I had a guarantee of $18,100 above expenses from this defendant if the complainants took over the Bridge stock for $34,300, and upon that guarantee I settled with the assured, paying the $34,300 cash, and taking the stock. I did not consider there was an opportunity to obtain more than defendant's guarantee and expenses. I was free to drive a better bargain, if I thought I could make one. In my opinion it was a fair proposition. I never put it up to anybody else. There were no other quarters bidding, no one else entered in the transaction. I hoped, however, there might be a substantial sum beyond Isaacs' guarantee and expenses and so advised the complainants. The allowance of $16,200 as damage was in compromise only on the condition that the value should be reduced to $34,300, as I did not admit at any time the loss was $16,200. An estimated loss does not mean a total loss as the merchandise can be reconditioned and sold at a good profit; sometimes [89] 50% of the loss is recovered. The defendant was an expert salvage man and there was reason to expect quite a reduction of the loss. A salvage man does not always make a profit above his guarantee and I have known where a deficit was reported. A fire sale ordinarily enhances the value of a stock over its actual value for sale purposes—it might be 50%,

(Testimony of George C. Main.)

25%, or 10%—it might be nothing. As a rule, I should think it would enhance the value. The fact that it is a fire sale and highly advertised has some value over the actual value. With an experienced man, an expert like the defendant, it is difficult to state what the percentage would be, but I should say probably 25%. This, however, is pure guess and speculation.

Isaacs' guarantee to the complainants of $18,100 did not represent the value of the salvage even at wholesale. I was disappointed with the small balance of $1,049.81 paid the complainants by the defendant and so expressed myself to them. As a matter of fact this $1,049.81 paid the complainants by the defendant amounted practically to only one-sixteenth part of the loss to them.

Isaacs undertook the sale of this stock and sold the merchandise as trustee for the complainants after their purchase of it in bulk for $34,300 cash. The defendant proceeded to sell the entire stock. He made his final report to the complainants through me in the latter part of November, 1913 (Deft. Ex. "2–Q"), with a letter (Complainants' Exhibit "A"), which report I accepted without an opportunity to verify it, as Mr. Isaacs and his papers were then in San Francisco. After this statement was received, I saw him numerous times, but never signified any desire for a more detailed account of the receipts and disbursements in connection with the retail sale.

I think I was out of town at the time of the sale in bulk and had no knowledge that Isaacs was a bid-

(Testimony of George C. Main.)

der and bought the stock. He told me so afterwards. The fact that it was to be sold in bulk was talked over between the defendant and myself before it was advertised. I do not know how long before or when. He said that expenses were beginning to eat up the stock and that he thought it best to sell it under sealed bids and I agreed with him that there would be a loss in conducting the sale any longer. As to his method of disposing of it, it was wholly in his hands. I had nothing to do with it. He could do as he pleased. **[90]**

I told him, however, if it were put up at sealed bids it could go at a very low figure, that they would steal it from him. He said substantially that he would see that we were protected on that proposition; that he would put in a bid in his own behalf at a figure which he thought would represent the fair value of the assets as they then stood and that if any other bid came along that was higher than his the other party was welcome to it, because it would mean that the stock would bring all it was worth. There was nothing in this plan as he outlined it to me that I thought was objectionable.

I understood after the sale in bulk what he paid for it. I knew because I knew the amount of the inventory and his bid was something about eleven thousand dollars which was forty or forty-five per cent of the invoice, the original invoice price of the goods. I thought at the time it was a very good bid. Looking at it now it seems we might have done better.

The inventory of $24,000 I did not make. Isaacs

made it. I understood perfectly it was based on the Bridge inventory price. I did not make it so I could not swear positively, but it was about 45% of the original Bridge inventory which I understood was the purchase price. When Isaacs took the inventory of the stock that was left after the retail sale, that was taken on the same basis as the original Bridge inventory of forty-five or forty-six thousand dollars, as far as I know, and I understood nothing was marked down on account of damage.

I have been an adjuster for twenty-five years and have done a great deal of adjusting for the complainants and am still doing work for them. I concluded that the first inventory had been fairly taken by Bridge at the original cost price, but much of the merchandise was old, some of the clothing at least twelve or fifteen years old, and many items were not worth anywhere near the original cost price. Ordinarily one days' notice of a sale is not customary and seems to me short, and would tend to cut out competition if the bidders had not been notified in advance. There are several [91] buyers right here where considerable competition is quickly obtained in the sale of large stocks of merchandise, and ready on short notice to examine a stock, figure on and bid for it. I have heard that Colsky, Buttnick and Westerman & Schermer put in bids. I thought at the time such notice was fair to complainants and sufficient and I have not changed my opinion on that. I went down to the store several times during the progress of the retail sale looking around to see how

(Testimony of George C. Main.)

the sale was going, but did not make any examination of the stock just before the sale in bulk.

At a retail sale the best merchandise sells first.

My stenographer told me that someone from the store came to my office every day with a bundle of sales slips. They might have been added up on my adding machine. I could not say whether, after being added up, they were left with my stenographer. These sales slips were never sent to me as a daily report by the defendant. I never received them as such. My office had nothing whatever to do with them except that the defendant used my adding machine.

By DEFENDANT'S COUNSEL.—In view of an adjournment and the reappearance of this witness on the stand, I ask that he produce as a part of his examination and cross-examination, the original inventory of Mr. Bridge, referred to in this examination, and proofs of loss filed by Mr. Bridge; and statements and correspondence between Mr. Main and the complainant companies, or whoever represented them at the time, in connection with this loss, and in connection with the arrangement with Mr. Isaacs for the handling of this stock, and in connection with the settlement made by Mr. Isaacs; and all correspondence in the possession of Mr. Main between himself and his principals, in which Mr. Isaacs' transactions occur in connection with the sale and are referred to—

You brought the documents that I asked you to produce, did you? Any papers of the character I

(Testimony of George C. Main.)

described in my demand?

A. Yes, all the original papers that I had.

Q. Have you got them here? A. Yes, sir.

Q. I ask that you produce them.

A. Here is all that I have got. There is a lot of stuff there which has no particular bearing on it, but all papers with reference to this claim are here.

(All of which were thereafter placed in evidence and consisting of the following:)

Letter of George C. Main to the complainants marked Defendant's Exhibit "2–T"; enclosing

Defendant's statement to the complainants marked Defendant's Exhibit "2–Q";

Report on fire loss of George C. Main to insurance companies marked Defendant's Exhibit "2–N."

Letter dated November 26, 1913, from D. Isaacs to George C. Main, marked Complainants' Exhibit "A." [92]

Testimony of Benjamin Goodwin, for Complainants.

BENJAMIN GOODWIN, called for the complainants, testified as follows:

I reside in this city and am the Pacific Coast Manager of the American Central Insurance Company and was such during the year 1913 throughout all the happenings which are the subject of this action.

When we received our proportions of the one thousand odd dollars balance paid at the time the final settlement was made we received it as made in the regular course of business and accepted it as such. At the time of this final settlement this de-

(Testimony of Benjamin Goodwin.)

fendant did not communicate to us that he was the purchaser of a part of our merchandise, nor did he ever do so since or before that settlement. No report of his being the purchaser of any of this stock was ever sent to us to my knowledge. We never had knowledge of the sale in bulk until after the decision in the trial of Seynei v. Isaacs; that was our first intimation. That was a few days before the commencement of this action.

This defendant has never offered to show us his books or render a detailed statement of his trusteeship of this merchandise before the bringing of this action, or since.

Cross-examination.

I know George C. Main. He is an independent adjuster and we would refer an occasional loss to him to adjust; he is not one of our men, not a salaried employee. He has adjusted other losses for us, both prior to and after the Bridge loss.

We might have had, through our general adjuster, Mr. De Lappe, communications with Mr. Main concerning this fire loss and the transactions of the complainants with the defendant. I could not tell whether the adjustment was referred to the defendant by Mr. De Lappe or myself. The loss was referred to the adjuster soon after it occurred, according to our usual custom. If I took any hand personally in the matter it was through correspondence between my office and Mr. Main, and I cannot recall what I may have written at that time without looking through my files.

(Testimony of Benjamin Goodwin.)

Q. I ask the witness, if your Honor please, to produce the correspondence here for examination—any letters from Mr. Main to your company, [93] or letters from your company to Mr. Main and not returned, during the year 1913.

The COURT.—I will pass upon that question if the authority of this man Main is questioned later. I don't know as it is.

Mr. SCHLESSINGER.—With that we conclude the cross-examination.

Mr. OLNEY.—I presume your Honor's ruling will apply to each one of the heads of the other companies. However, I will ask the questions so as to complete the record.

Testimony of J. C. Johnston, for Complainants.

J. C. JOHNSTON, called for the complainants, sworn.

Mr. SCHLESSINGER.—I shall ask your Honor to note that an objection has been made upon the part of the complainants to the introduction of that character of evidence.

The COURT.—It is an equity case and I am admitting it subject to the objection.

Mr. OLNEY.—Q. Mr. Johnston, you live where?

The COURT.—To save time, counsel will probably have no objection to your asking him the same general questions, all in one, that you asked the last witness, and ask him if his answers are the same. Have you any objection to that form of question?

Mr. SCHLESSINGER.—I would like to have it

(Testimony of J. C. Johnston.)

understood that the same questions were put to this witness and an objection made by counsel, and your Honor of course making the same ruling.

Mr. OLNEY.—And the same to each of the other witnesses?

Mr. SCHLESSINGER.—Yes, and a declination on the part of the plaintiffs to produce correspondence with Mr. Main.

Mr. OLNEY.—Then as I understand the stipulation it is that the heads of each of these companies, their answers to the questions shall be considered the same as those of Mr. Goodwin.

Mr. SCHLESSINGER.—They will have been deemed to have been asked the [94] questions, and the same objections made, and that his Honor makes the same ruling.

Mr. OLNEY.—Very well. Then we will excuse the heads of the other companies.

Mr. SCHLESSINGER.—Just a minute. I don't think that is quite far enough. Do I understand that it is not questioned now that George C. Main was the adjuster for these complainants?

Mr. OLNEY.—There is no such matter before the Court.

Mr. SCHLESSINGER.—Let the witness take the stand then.

Mr. OLNEY.—There is no question that Mr. George C. Main was the adjuster for those five companies upon this loss; there never has been any question.

Mr. SCHLESSINGER.—That is all then.

(Testimony of J. C. Johnston.)

Mr. OLNEY.—It has never been questioned at any time.

Testimony of Sanford H. Horne, for Complainants.

SANFORD H. HORNE, called for the complainants, testified as follows:

I am in the oil business occupying the position of manager of the concern. On February 23d, 1916, I remember going to the office of the defendant on California Street in this city at the request of Mr. Olney and witnessed a conversation there between Mr. Isaacs, the defendant in this case, and Mr. Olney.

I went down to the office with Mr. Olney and Mr. Olney went up to Mr. Isaacs and said, "Mr. Isaacs, I have come to ask for an accounting on behalf of the Insurance Companies in the matter of the Bridge stock."

The COURT.—What did Mr. Isaacs say?

A. Mr. Isaacs said, "So far as they are concerned, I am finished; they will get no accounting."

THEREUPON, COMPLAINANTS RESTED. **[95]**

Testimony of Lester Herrick, for Defendant.

LESTER HERRICK, called for the defendant, testified as follows:

I am a certified public accountant and my office is in this city. At the defendant's request I have made an investigation of certain accounts and transactions appearing as having been carried on by Mr. Isaacs in connection with the salvage of Messrs. A.

(Testimony of Lester Herrick.)

Bridge & Co. at Seattle. I have made a report with respect to my investigation and have that report with me. It clearly presents all the information that we have obtained.

This report is correct upon the basis upon which it is prepared.

Mr. SCHLESSINGER.—We will ask that this be marked as our exhibit.

Mr. OLNEY.—Are you offering it?

Mr. SCHLESSINGER.—Yes.

Mr. OLNEY.—I object to it until we have the data upon which it was made.

Mr. SCHLESSINGER.—That goes to the weight of the testimony, not the admissibility of it.

Mr. OLNEY.—Conclusions of experts are not admissible in evidence until the foundation is laid for them by introducing the other papers and documents.

Mr. SCHLESSINGER.—Unquestionably if that is not shown it does not amount to anything. He testified to having made this from an examination of certain data which he specifically mentioned. That data is in court.

The COURT.—Do you expect to identify that later?

Mr. SCHLESSINGER.—Certainly, the testimony has gone in somewhat out of order, but you have no objection to that?

Mr. OLNEY.—I want to make my objection to this being offered in evidence; it is a long report; I have certainly got to examine it.

The COURT.—The objection, of course, is well

(Testimony of Lester Herrick.)

taken because the report is somewhat out of order, but if counsel desires to get through with the witness—

Mr. SCHLESSINGER.—I am simply wishing to expedite matters.

The COURT.—Of course unless the report here is substantiated by the testimony offered later, the Court will not consider it.

Mr. OLNEY.—I ask leave to ask the witness a few short questions.

Mr. SCHLESSINGER.—Oh, no, I shall object to that now because I will substantiate it. If it is not substantiated it may go.

Mr. OLNEY.—I want to ask this witness in regard to certain data that he has named. I am objecting to this report and I desire to examine the witness regarding his data.

Mr. SCHLESSINGER.—I object to any cross-examination at this time.

The COURT.—Proceed with your examination of the witness and if it is not substantiated I will strike the report. I will give you full opportunity for cross-examination. I will not rule upon your objection at this time, but I will admit it. If it is not substantiated it will be rejected.

Mr. SCHLESSINGER.—I will ask you whether or not in the course of your examination you examined a cash-book, or what purported to be a cash-book, covering the sales of 19 days.

A. Yes.

Q. I will ask you whether or not you examined the

(Testimony of Lester Herrick.)

entries in that cash-book. A. I did.

Q. State whether or not they appear to have been made in the due and regular course of business.

A. They did in accordance with the method that was used.

Mr. SCHLESSINGER.—We will now offer in evidence this cash-book.

Mr. OLNEY.—We object to it on the ground the proper foundation has not been laid.

Mr. SCHLESSINGER.—It is the basis upon which he made his report. We will, [96] of course, supplement the evidence by a showing it was the cash-book kept by Mr. Isaacs.

The COURT.—The same course will be pursued.

Mr. HERRICK.—(Continuing.) With reference to page 5 of my Statement A and this item "Cash sales, as per statement B., $17,779.60." Those figures appeared upon page 68 of the book which has just been introduced in evidence, and appeared to represent the total daily sales during the period from September 6th to September 27th; they are entered as the daily totals and produce the total for the period you have just mentioned.

Mr. SCHLESSINGER.—I will ask you whether or not in connection with your examination you examined certain sales slips.

A. Yes.

Q. I will ask you whether or not those are the slips you examined.

A. Yes, those I believe to be all the slips that we examined.

(Testimony of Lester Herrick.)

WITNESS.—(Continuing.) These tags or sales slips, whatever they may be called, are somewhat poorly written and a doubt may exist as to the actual accuracy of every individual slip. These slips are itemized as to the amount of sales. This cash-book is not likewise itemized as to the character of sales. It simply exhibits one entry appearing as the total sales of that day. Taking September 6, 1913, the cash-book shows receipts of $3,707.95. There is a discrepancy there of approximately $10 between the slips and the cash-book. These slips bear serial numbers but not one complete series; they bear the numbers appearing in the various books. These sales tags or slips appear, so far as I could determine, to have been made in the due and regular course of business. They do not bear any evidence or earmarks or changes, obliterations or alterations, to any extent that would cause any suspicion. I refer to the integrity of the tags that are here.

Mr. SCHLESSINGER.—We ask that these slips be admitted in evidence.

The COURT.—They will be admitted assuming that they will be hereafter identified. It is merely a question of the order of proof.

Mr. OLNEY.—This is something that is going beyond the order of proof. He could bring in half of these slips; or he could bring in two-thirds of these slips. How do we know what he has left out? He has done this same thing before. He brought in slips in the other case—

Mr. SCHLESSINGER.—I object to any such statement.

(Testimony of Lester Herrick.)

The COURT.—I have already ruled. There is no impropriety in permitting this witness to testify out of order. Of course if the report is not substantiated by testimony offered later it will go by the boards and amount to nothing.

Mr. OLNEY.—But this is not the report he is offering now; he is offering in evidence the sales slips. [97]

Mr. SCHLESSINGER.—I am offering in evidence the sales slips.

The COURT.—For the purpose of showing the basis on which he made the report.

Mr. OLNEY.—Only on that basis?

Mr. SCHLESSINGER.—Unquestionably.

WITNESS.—(Continuing.) I found a salary expense account in the book just introduced in evidence. Neither the names nor purported names of clerks are therein given nor the amounts of salaries paid. The record is merely that all disbursements are made—specified as of one character or another. I examined the item "rent, $920." That appears as an expense of the enterprise and is supported by voucher in the following words:

> "This is to certify that the rent of the premises on First Avenue South, Seattle, Wash., foremerly occupied by A. Bridge & Co. was paid to us by the adjusters on October 27th, 1913, for the month of September, 1913, in the sum of $920."

The expense items are only partially supported by vouchers. There were some errors in statement as

(Testimony of Lester Herrick.)

compared with the book. I did not examine the defendant's bank-books but his statement of account with the Seattle National Bank. I found a deposit apparently unconnected with the sales of this business. This statement purporting to be the statement from the Seattle National Bank as to the period from September 6th to September 29th total deposits of $19,744. I have received from Mr. Isaacs checks which I have here, drawn on the First National Bank of North Yakima, Washington, calling for a total amount of $2,850, and it is evident that these checks were deposited in the Seattle National Bank. It is a conclusion not a statement of facts that these checks were indicated in those bank deposits. Regarding the cash-book, if I may suggest, I think it would be proper to designate that book as a record book more than a cash-book, inasmuch as it is simply an ordinary book that exhibits a simple, primitive, crude record of sales, and of disbursements, and of nothing else. It is pencil writing.

Mr. SCHLESSINGER.—Now, if your Honor please, I will offer in evidence a cloth covered book—I might do this to shorten the offer, I might offer in evidence all of the books and records appearing upon page 1 of Mr. Herrick's report.

The COURT.—They will be received for the purpose of identifying them as the books forming the basis of the report; but will not be admitted as evidence until they are further identified. [98]

Mr. OLNEY.—That ruling, I presume, applies also to the sales slips.

(Testimony of Lester Herrick.)

The COURT.—That refers to everything in his report.

Mr. SCHLESSINGER.—Mr. Herrick, from your examination of these records and data submitted, are you satisfied that the statement rendered, that is, is it your opinion that the statement rendered by Mr. Isaacs to the insurance companies was correct?

A. My opinion is based entirely upon the evidence which has been presented to me, and so far as I can form an opinion from an examination and careful consideration of these papers this statement was correct.

Mr. SCHLESSINGER.—Now, your Honor, we will ask that these records, and data, documents and papers, specified on page 1 of the report of Lester Herrick be admitted in evidence.

The COURT.—All these papers referred to by this witness will be marked in some way to identify them as the papers which he used in making up his report.

Mr. SCHLESSINGER.—I think your Honor has ruled that these may be admitted as one exhibit.

The COURT.—I am only admitting them conditionally. I am admitting them for the purpose of identification in connection with this report.

Cross-examination.

I was employed some three weeks ago. The examination was not entirely made by me but under my direction. The report is made up from these slips and books exactly as I originally found them. The examination, as appears upon the first page, was

investigation and a partial conclusion on the termination upon all the things that were furnished that appeared to have anything to do with the preparation of a statement of this transaction; and they are all recited on the first page. They mainly consisted of this cash-book or record-book and the sales slips and these vouchers.

My report has been made up from what has been furnished me. I don't know what has not been furnished me.

Q. You did not compare each separate sales slip?

A. There is nothing to compare it with.

Q. That is what I thought.

A. What could there be that they could be compared with, unless there was a complete record of the individual sales?

Q. There is no complete record, is there?

A. No, there is none.

Mr. SCHLESSINGER.—Except as appearing on the slips themselves?

A. Well, there is nothing appearing on the slips themselves except a showing of the sales that they are presumed to evidence.

Q. Did you also see the original adding machine totals of the slips? A. No.

Q. Or cash register totals?

A. No, nothing except what I have referred to.

Q. Then you saw no other records than these slips and these books? A. No.

Q. If any slips were missing, Mr. Herrick, they were not entered in the book, were they? You do not

(Testimony of Lester Herrick.)

know how many slips were missing, do you?

A. No, I don't know whether any slips were missing or not. [99]

Q. You simply made up your report from the slips that are here? A. Yes.

Q. You had nothing to check up those slips?

A. Nothing except the entries which are made in this book which appear to represent the daily total of the sales. I don't know but that there might have been slips containing entries of sales which are not here, but there is nothing to indicate that there were, and there is additionally the indication of these entries, unless they are false, that these are all of the slips that there were. This book seems to be mixed up with a whole lot of other accounts.

Q. Mr. Herrick, if it should appear that upon this sale for which these sales slips have been produced here there were indexes made by each clerk showing the amount of each individual sales slip, and the total cash sales, and which was turned in each night to the defendant, should not those indexes be produced here and accompany these sales slips in order to make a complete record?

A. Yes, that is a customary salesmens' book. These books contain usually 50 of these slips with carbons and there is also in the book a sheet having lines and numbered spaces from 1 to 50, for the purpose of taking an entry of the total of each individual sales slip, and upon the conclusion of the day or the completion of the use of the slips, he figures his total and it becomes a record that enters into the

entire record constituting an audit of the transactions of the day.

The COURT.—Totaled up by the salesman?

A. It is totaled by the salesman and returned first to the proper office and in an organized institution becomes a part of the organization records of the business of the institution.

Q. These sales slips in the book are removable?

A. Yes.

Q. This index in the book is returned at the close of the day to the cashier?

A. Yes, that is the proper practice.

Q. And that is the only method, as you say, as a matter of audit, by which the sales slips themselves, could be checked, the salesmen could be checked?

A. It is not the only record.

Q. It is the chief record to check the sales record?

A. Yes. It is the means of carrying out the check of individual sales to the complete recapitulation.

Q. It also checks up the sales slips, does it not?

A. Yes.

Q. Your report, I believe, does not include these indexes? A. No.

Q. There were none such furnished you?

A. No.

Q. I believe you also stated you did not have furnished you any of the original adding machine totals or cash register totals of these sales by which they could be checked up? A. No.

Q. I believe you stated also your report was based upon copies of deposit slips and not on the originals; that is so?

(Testimony of Lester Herrick.)

A. Yes, referring to the deposits appearing to have been made in the Seattle National Bank during this period, that is true.

Q. You don't know where they came from or anything except that they were produced for your examination?

A. I don't know where they came from.

Q. Then your only knowledge of the North Yakima deposits in this bank are the four cancelled checks of September, 8, 9, 16 and 22, which have been produced in court here?

A. And the checks themselves.

Q. Your only knowledge of these deposits are the four individual checks that have been produced here?

A. Yes, these checks which have been presented here upon the North Yakima bank, making a total amount of $2,850, are evidenced by the endorsements [100] thereon that they were deposited in this bank and they correspond with the entries on these copies of the deposit slips. Upon the basis of that information, I have concluded that the deposit embraced these particular checks.

Q. Have you examined Isaacs bank-book of the Seattle National Bank, and the stubs of his check-book covering the period of your report?

A. No, I have not.

Q. Those were not produced to you and they were not among the data which you have offered?

A. No, I have not seen them. I relied upon this statement purporting to be a statement from the

(Testimony of Lester Herrick.)

Seattle National Bank of the entire account from its beginning to its conclusion.

Q. Please tell me from your data, Mr. Herrick, the number of suits sold during the insurance sale.

A. I have no information on that subject.

Q. Or the number of boots and shoes?

A. I have given no attention to that phase of the matter.

The COURT.—Mr. Herrick has stated substantially the records and documents upon which his report is based, and I assume that he had no information outside of that.

A. My report is complete from beginning to end.

Mr. OLNEY.—Weren't you instructed to prepare totals of the quantities of the various articles of merchandise sold at this sale in order that the same might be checked up with the inventory?

A. I was not.

Q. Will you look at this book of records, Defendant's Exhibit "C," which you yourself say cannot be called, as I understand it, a cash-book?

A. It is a combination cash-book, journal and ledger.

Q. If this book is made up from the total cash in the drawer each night at the conclusion of business, then is it not also an incomplete record in that it might not show the sums of money taken out during the day, or not put in the drawer during the day?

The COURT.—I do not think it is necessary to ask an expert witness to deduce conclusions which are inevitable.

(Testimony of Lester Herrick.)

Mr. OLNEY.—The only object of the examination is that the decisions are very strong that a trustee must keep proper books of account of the trust fund—

The COURT.—If money was taken out of there, the book, of course, does not show it. His conclusions do not amount to anything. You are asking him to deduce a conclusion which is self-evident to any man.

WITNESS.—(Continuing.) From a standpoint of proper and complete accounting, the records shown in the cash-book are crude, primitive and unsatisfactory. However, the main point is their integrity. A business continuing indefinitely could not proceed with such records. Taking into consideration that this is what we call a hurry up proposition; there is no organization of accounts or otherwise, whereas the entire transaction lasted three weeks. It appears to have been the intent of the defendant to keep an honest record, and I see nothing indicating the contrary. Frankly answering your question the record is a very abominable accounting.

The bank deposits show an excess of about $900. This item of $900 is not of very much consequence. It is indefinite. By a consideration of the [101] money appearing to have been received by Mr. Isaacs from this sale, with a deduction therefrom of the payments appearing to have been made by him, there is left a surplus of money apparently received and available for deposit. The amounts as deposited

(Testimony of Lester Herrick.)

were about $900 more than this available balance. Mr. Isaacs has made explanations to me but simply by word of mouth, so therefore, the only considerations of that $900 that can be fairly given is that the deposits in the bank exceeded the amount available and that the final deposit may have embraced some other money. [102]

Testimony of David Isaacs, in His Own Behalf.

DAVID ISAACS, called in his own behalf, testified as follows:

For the last fifteen years I have been engaged in the business of adjusting fire losses, handling salvage merchandise for the account of insurance companies on a basis of 20% to myself plus expenses when I handled stocks on guarantees. About the 15th day of August, 1913, pursuant to a telegram from George C. Main, I left San Francisco for Seattle. When I arrived there he presented me with an inventory of the Bridge stock and asked me to examine the goods and report to him. My report to him was the goods were subject to considerable depreciation; that the stock was old and the inventory inflated; that the value of the goods before the fire was in the neighborhood of $34,000, and that in my judgment the fire loss was $16,000. Main asked me what was best to do. I told him if Bridge's assignee would not accept that figure, if he could get the sound value of the merchandise down to where it belonged, viz., $34,300, and the use of the premises to run a sale, I would advise the companies to take over the

(Testimony of David Isaacs.)

stock at that figure and guarantee them $18,100 above my commission of 20% and expenses on a sale of the stock. I, thereupon, returned to San Francisco. Subsequently, Mr. Main notified me of the acceptance of my offer, and on the 5th of September, 1913, accompanied by my wife and daughter I returned to Seattle with a certified check for $18,100, which I gave to Mr. Main, and I, thereupon, took possession of the stock under my guarantee and proceeded with the sale which opened on the 7th of September, 1913.

Before I returned to Seattle I engaged a Mr. Bass of Portland, instructing him to go to Seattle and take possession of the stock, had the keys turned over from Mr. Main, telegraphed Mr. Sidder to engage Mr. Seynei, and for both of them to engage the necessary help to mark the goods for sale and put them in good condition, and to start the sale as soon as possible; all of which they did.

They had not arranged for a cashier, however, and I asked my wife and daughter to act as such. [103]

I went along with the sale. The sale was a success to begin with. The first day's receipts were $3,700 odd dollars; the next day they were $1,600, and it kept going down and down. I said to Main it is running down as low as $400 or $500 a day, the average daily expenses were over $200, and the stock being all broken up and about a week before the retail sale ended I spoke with Mr. Main about discontinuing it. I told him we couldn't afford to continue the sale much longer and that the best thing to do would be to finish the rest of the week and then sell

(Testimony of David Isaacs.)

the stock out in bulk. He said: go ahead, use your own judgment; Isaacs you know what will happen to that stock if you sell it in bulk to the merchant here; they will steal it; I don't think you will get 30% for the stock. I informed him that I anticipated going in business in the northwest and that, provided I could get a lease on the premises, I suggested that I would put in a bid on this stock myself in the name of some other person, and that if anyone is willing to pay more than I, they are welcome to the stock. Mr. Main asked me how I would conduct that sale and I said, "I will notify all the merchants in Seattle and the surroundings, accumstomed to buying and dealing in that class of merchandise." He said, "Very well; go right ahead," and I immediately notified all the merchants who I thought were interested, Wasserman & Schirmer, Kessler, Colsky, Cone and Buttnick. I received about eight or ten bids. Wasserman & Schirmer bid 25%, Colsky $4,200, Cone bid between 25% and 30%, Kessler's bid was 30%, Buttnick bid between 25% and 30%. Brenner Bros. of Bellingham, Wash., made an offer of $10,000, conditioned that they could get the premises for continuing the sale, which I could not accept under those conditions.

These bidders came up to the store before the sale. I showed them the original inventory given to me by Main. I told them they would have to examine the goods and judge by that inventory. I told them I would take an inventory of the goods that were left at the close of the sale but I could not guarantee the

(Testimony of David Isaacs.)

amount of the goods that would be left.

I also put an ad in the "Times" on Sunday. I did not think this would do any good but thought it was the proper thing to do.

Monday morning I gave to the merchants who came in the store a copy of the [104] inventory taken of the goods that remained and informed them the bids would be opened at 2 or 3 o'clock, I don't remember which. At the request of the bidders the time of the sale was continued for one hour, and I waited that hour. There were probably 50 persons in the premises at the sale. When the time of the sale arrived, all of the bids were opened and read in the presence of all the people on the premises. My bid was 45%. It aggregated $11,094. I told Mr. Main 3 or 4 days before the close of the retail sale I would bid over forty, or forty-five cents on the dollar. I intended to continue with the sale under the name of Mr. Seynei. He was to run the store for me.

I discussed with Mr. Seynei 3 or 4 days prior to the close of the retail sale the proposition of continuing the sale on my own account and he and I went over the entire matter, that is, the amount of the stock I would have to carry in order to properly conduct the business; also the probable expense thereof.

In the conduct of the retail sale for the insurance companies I gave no instructions to any of the retail clerks how they should return their sale accounts, leaving everything to Mr. Seynei who had charge of the conduct of the sale during those 19 days.

(Testimony of David Isaacs.)

I have possession of all of the original sale—slips —some 10,000. They are in the handwriting of the various clerks, and, at the end of the retail sale, they were taken by me from Mr. Main's office where they had been taken by Mr. Bass and my daughter. We used his adding machine. I have not altered or in anywise changed any of these slips, and to the best of my knowledge and belief they represent all of the slips of the sales during the nineteen days.

When I arrived in Seattle, Mr. Bass handed to me Defendant's Exhibit "C" (the record-book), and I found those entries there on page 184 under date August 3d, showing the petty cash advanced by him. On page 68 thereof we entered all the matters pertaining to the sales people, showing the day they started to work, part of which is in my handwriting.

Mr. SCHLESSINGER.—Q. Look at your original records, if you will, and give us the names of your employees and the amount paid them, and then give us the exact totals.

Mr. OLNEY.—We further object unless it appears by whom this record was kept.

Mr. SCHLESSINGER.—Is that (Defendant's Exhibit "C") in your handwriting?

A. Part of it. [105]

Q. Was that kept in the due and regular course of business of the 19 days' sale? A. Yes.

Mr. OLNEY.—How much of it is in your handwriting?

A. The first week is not in my handwriting; part of this is in my handwriting.

(Testimony of David Isaacs.)

Q. What part? A. That material there.

Q. The first item, page 68, that is in the handwriting of yourself?

A. Yes; that is taken from the back of this book.

The COURT.—I understand that; you stated that yesterday.

A. Carried over; this is in the handwriting of the gentleman I sent up to take charge of the place.

Mr. SCHLESSINGER.—This book was used by you in the regular course of business? A. Yes.

Mr. OLNEY.—We object to the evidence of the witness in so far as he is testifying from records kept by some other person.

The COURT.—Who made the other entries?

A. A man by the name of Bass.

Q. From what source did he make them?

A. From the accounts that were given to him; part of them were made before I got there and then when I arrived, the names of the various employees were entered there, and Mr. Seynei told me how much to pay to these various employees; he entered them in the book—stood alongside of me at the desk Saturday night when we paid off the help, Mrs. so-and-so so much and that money was handed to that lady—then he would enter her name and the amount.

Mr. SCHLESSINGER.—You examined that book from time to time and used it in connection with your business? A. Yes.

The COURT.—The objection is overruled.

The labor the first week was $270.11. The total amount paid for labor as appears from this exhibit

(Testimony of David Isaacs.)

during the retail sale is $1,654.71.

Mr. SCHLESSINGER.—Now, Mr. Isaacs, how did you pay your labor account there during those 19 days?

A. Paid them cash out of the drawer Saturday evening.

The discrepancy of $8 or $10 between the sales noted in the cash-book on September 6th, and that of the sales slips themselves for the same day, I will tell you how that could be accounted for by a part payment being made on a suit at the time of sale, and the balance on delivery. The check for the sale not going into the cash of that day's sale. I cannot account for the difference between the total cash represented by me to the complainants as having been taken in by me at the retail sale and the amount of the sales as appears by the sales slips amounting to $8.60. I might account for it in this way by refunding to the purchaser a dollar or two where complaints were afterwards made that the goods sold were damaged.

Mr. SCHLESSINGER.—Q. Have you examined the first inventory? A. Yes.

Q. Does it purport to give the number of articles on hand at the store at the time you entered it?

A. Yes.

Q. Did it give it item by item? A. Yes.

Q. Does it give the number of suits sold?

The COURT.—I presume the inventory speaks for itself.

Mr. SCHLESSINGER.—I simply want to lead up

(Testimony of David Isaacs.)

to it. Does it give the number of suits sold, for instance, the number of suits on hand?

A. The number of suits on hand, yes. [106]

Q. Are you able to state the number of suits on hand at the time you entered that store, according to the inventory? A. Yes.

Q. Will you please state the number of suits?

A. Get me the inventory. The inventory starts with total No. 1, showing so many suits at so much.

Q. Taking that as the principal item, what is shown there as to the number of suits on hand when you entered the store?

A. There were 1,577 suits of clothes.

Q. I will ask you whether or not you have examined these sales slips to ascertain the number of suits sold by the clerks during the retail sale?

A. Yes.

Q. What do the sales slips show in that regard?

A. The sales slips show 470 suits sold.

The COURT.—Out of a total of how many?

A. 1,577.

Mr. SCHLESSINGER.—How many suits were left at the tail-end of the sale?

A. The inventory shows 1,112 suits.

Q. That is what you bought at the bulk sale?

A. Yes.

Q. Now I will take the next item, overcoats: How many overcoats were on hand according to the Bridge inventory when you entered the store?

A. 332.

Q. How many overcoats were sold, according to

(Testimony of David Isaacs.)

the sales slips made by the various clerks?

A. 173.

Q. How many did you take over in the bulk sale?

A. 213.

Q. Now, take the next item, shoes, according to the Bridge inventory: How many shoes were on hand when you entered the store?

A. They are designated as shoes and rubbers; there were 1,981 pairs.

Mr. OLNEY.—We object to this, if your Honor please, because my recollection is that the rubber goods and the shoes were entirely separate.

Mr. SCHLESSINGER.—If you want them segregated we will segregate them.

The WITNESS.—They are the shoes and rubber boots; they were put in that way. The closing inventory, meaning the second inventory, showed 856 pair; the sales-book showed 1,146 pair sold.

Q. How many were left over after the bulk sale?

A. 856 pair.

Q. Take the next important item, underwear?

A. That is designated as shirts, underwear and overshirts; there were—

Mr. OLNEY.—That is furnishings?

A. That is furnishings; they consisted of various items, but I have the other parts of the furnishings.

Mr. SCHLESSINGER.—Q. Just read the next important item.

A. The shirts and underwear show—

Mr. OLNEY.—I would like to have the shirts and underwear separated.

(Testimony of David Isaacs.)

Mr. SCHLESSINGER.—You can do that on cross-examination; if you want to refer to every collar and every single sock you can go ahead and take your time and do it then.

A. There were 7,745 pieces; the closing inventory showed 2,669 pieces; the sales-book shows 4,910 pieces sold. Socks, 3,101, in the opening sale; the closing inventory showed there were 65 pair left; the sales slips show 2,990; gloves and mittens, 919 pair, closing inventory showed 355; the sales slips showed 437.

Q. Go right on and complete the list of items.

A. Handkerchiefs and mufflers, 677—this is the opening; the closing number was 56; sold by sales slips, 467.

The COURT.—Are there any important items remaining?

Mr. SCHLESSINGER.—No, they are unimportant; it would simply tend to show the absolute integrity of the accounts.

The WITNESS.—May I answer further with reference to this, there are a few items that are over and a few items that are short.

Q. Explain that to his Honor.

A. Some of the items show, for instance, the suits show that there were 56 more than I ever received; on the pants it shows that there are 64 pair short of what I received; on the overcoats it shows that there is 54 more than I had received according to the inventory. In the underwear, there was some of the goods entirely obliterated, which were stated in the

(Testimony of David Isaacs.)

original inventory as handed to me, and also shown in the other depositions taken, amounting to about three or four hundred dollars, although they were itemized as merchandise being on the premises at the time of the fire [107] and counted as such, and nevertheless they were never turned over to me, because they were entirly burned up. I have not deducted that amount, because it would be impossible for me to so; the underwear went at various prices, and it would be impossible for me to state how many pieces—

Mr. SCHLESSINGER.—I think you have given sufficient about that and counsel may cross-examine you on it if he cares to do so.

The WITNESS.—If I may state, your Honor, the fire had burned through the premises.

The prices of the second inventory compared exactly with the prices of the first, and as to quantity it corresponded with the goods that were left. By these sales slips I have also determined the actual amount of goods sold by each clerk, and I can give the amount for the Court's benefit.

The COURT.—I do not see any necessity of going into it unless counsel desires to go into it on cross-examination.

WITNESS.—(Continuing.) After I purchased the stock in bulk I had conversations with Mr. Main as to the amount I paid for it, and on two different occasions went over with him the various items included in my statement as appears in the amended complaint. Before rendering the final statement I

(Testimony of David Isaacs.)

called on Mr. Main and told him the reason I was unable to send him a complete report of the transaction was because there were two items—advertising and light bills—that had not been settled and had to be adjusted. At that time I informed him of the amount of the sales and the commissions. I figured with him the amount of my commissions on both sales, retail and bulk, at 20%. He made no objection to that charge. We also spoke of the net proceeds to the complainants and I told him as soon as I had the final figures I would send him a statement from San Francisco with a check for the balance to the complainants. The date of the statement was the 29th day of November, 1913. He never raised any objection to any of the items in that statement. The amount of $28,901.92 represents in full the total amount received by me both from the retail and bulk sales.

Q. I will ask you, Mr. Isaacs, whether or not you paid out the rent, that $920 referred to in this voucher No. 1.

The COURT.—That is admitted, I understand. Mr. Seynei testified to that.

Mr. OLNEY.—There is no question about that.

WITNESS.—(Continuing.) I also paid $66.88 for light; $54.59 for insurance; $1,204.21 for advertising, and also advanced the further sum of $47.26; vouchers for all of which I have here. The amounts thereof are correct. [108]

I turned over the goods I purchased in bulk to Seynei & Co. for the same amount I paid for them,

(Testimony of David Isaacs.)
not allowing Seynei & Co. any part of my commissions. The expense of running a retail sale amounts to a fraction over 23%, and is the ordinary expense of conducting a sale of that character. In that sale I tried to do the best I could. I made no charge for the services of my wife and daughter.

The usual expense of conducting a business as was conducted by Seynei & Co. is between 25% and 26%. Some will run to 30%.

I will say that this tag from Plaintiffs' Exhibit 1 has never been on a coat. It could not have been in the condition it now is if it had. It is a physical impossibility to put that tag on a coat as it is supposed to be put on for the purpose intended and taken off without being destroyed. Since rendering this statement in November, 1913, I have met Main twenty-five or thirty times. I think in June or July, 1914, I had a conversation with Mr. De Lappe concerning this accounting. I told Mr. De Lappe that I was approached and told if I didn't give up a certain amount of money, certain books and papers would be turned over to the insurance companies and trouble would be made for me and this case would come along. I told him, I says, "Now, Mr. De Lappe, there has been a question about this accounting; you do not want to put me to any expense or trouble, and you do not want to go to any expense or trouble." I said, "I have the data, the entire data, and it can be checked up" I says, "If you will get an expert accountant I am willing to pay all the expense—please check it up, have the account checked

(Testimony of David Isaacs.)

up"; he said to me, "Now, Isaacs, if we want that account, we will let you know."

Mr. SCHLESSINGER.—Mr. Isaacs, there had been a suggestion made here that you secreted some of the goods, or did not expose them on the shelves, on the tables; what is the fact in regard to that?

A. No such thing ever existed; it would have been impossible to do it.

Q. I will ask you whether or not at any time you so arranged the contents of that store as to depreciate the value of the stock.

A. I at no time had any occasion to handle the stock; it was always handled by the clerks.

A few days before the retail sale was over there were a lot of pennies, nickels and dimes that I had no place to keep in the store, and they were too bulky to take to the bank and at this man's, Seynei's, suggestion, I put them in the safe belonging to a man by the name of Aaronson, [109] who was in business across the street. Otherwise, I kept the money in a safe deposit vault during the busy season and deposited it the following morning in the bank.

I never had any talk with Mr. Seynei with regard to the elimination of any bidder at the bulk sale. I never told him that the stock purchased by me in bulk was actually worth $24,000; that I had made a successful purchase from the complainants and had the best of it, or that it was worth one hundred cents on the dollar.

Before the retail sale commenced I deposited a check of $1,000 in the Seattle National Bank. I also,

(Testimony of David Isaacs.)

after the sale commenced, deposited with the Seattle National Bank other sums of money unconnected with the retail sale, which I received by check for merchandise sold at different places on different sales. (These are the four North Yakima checks referred to in Herrick's Report and were thereupon offered in evidence.)

Mr. OLNEY.—Q. So you commingled the funds from this sale of merchandise with your own individual bank fund?

A. I kept the account in my own individual name.

Mr. SCHLESSINGER.—We will offer in evidence the various slips, documents and data identified by Mr. Herrick yesterday afternoon and referred to specifically on page 1 of his report.

Mr. OLNEY.—We object to the admission in evidence of these on the same grounds as offered to the partial offer of these other copies. These are not original records; every one of them are copies; the originals are unaccounted for. As far as this Exhibit "C" is concerned, it appears that most of the book is in the handwriting of a bookkeeper and kept by a bookkeeper who has not been produced upon the trial of this action. The nonproduction of the bookkeeper is a presumption against this defendant.

The COURT.—Under the testimony the book was kept under the immediate supervision of the defendant; he paid the money and the bookkeeper made the entries there, practically in his presence. I will overrule the objection to the book. I will admit the sales slips in evidence upon the identification made.

(Testimony of David Isaacs.)

The different receipts and vouchers the witness has testified that he paid I will also admit. The objection to the deposit slips will be sustained.

Cross-examination.

Mr. OLNEY.—Q. Is it not a fact that Mr. Main never saw any of these sales slips?

A. I was not there when they were delivered to him.

Q. To refresh your memory I read you a question by Mr. Olney to Mr. Main with reference to these sales slips, and his answer:

> "Now I want to make that evidence perfectly clear in regard to these sales slips referred to by counsel: These sales slips were never sent you as a daily report by this defendant?
>
> A. No. [110]
>
> Q. You never received them as such?
>
> A. No.
>
> Q. Your office had nothing to do with them except that he used your adding machine?
>
> A. Nothing whatever."

Does that refresh your recollection?

A. That is what he says.

WITNESS.—(Continuing.) I had two cash registers on that sale. I had no adding machine totals although the sales slips were sent to Mr. Main's office to be added on his machine.

Q. Is it not true, Mr. Isaacs, that if you had not lost or destroyed these totals made daily, that is the record which should show all these sales?

A. That is not true.

(Testimony of David Isaacs.)

Q. I say if you had them here, that would be the record which would show this?

Mr. SCHLESSINGER.—That is a matter of argument.

The COURT.—I do not care about any argument with the witness on cross-examination.

WITNESS.—(Continuing.) I have not the sales tags that were on the clothing showing the cost price and selling price; they were not kept; they were left on the sold garment. They would show the cost; they had a code mark on. These sales slips show the selling price; what they were sold for. I had the salesmen's indexes; they were left in the back of the books. They are to protect the owner or seller of goods from stealing by salesmen; they check up the daily sales, and they check up these sales slips. The sales slips are original and the index cuts no figure whatever; it would not show whether it was a suit of clothes or a pair of pants or a collar button. The sales slips show what articles were sold and designate the totals.

I could not say whether it is a fact that Mr. Main was in Vancouver, B. C., adjusting a loss there for two weeks immediately preceding the sale in bulk.

I had another accountant working on this job several weeks before the appointment of Mr. Herrick. His name was Dolge. It is not a fact his report to me was rather disappointing.

I first met Mr. Main in Wallace, Idaho, about 6½ years ago. I have known him ever since. I was never interested with him in any corporation. [111]

(Testimony of David Isaacs.)

I had a stock company and I tried to sell him some of my stock. He did not own any of that stock. I laid aside $4,000 of stock for him subject to his wish to purchase it, in my Coast Fire & Marine Salvage Co., formed for the purpose of handling salvage merchandise. That corporation is the same corporation under which this sale involved was advertised in the "Seattle Times."

Mr. Seynei and I had no other merchandise in view at the time we formed our partnership. I was to handle any kind of merchandise. The second inventory was made under my direction for the purpose of selling the stock to whoever would pay the most for it. It was made under my instructions. I did not take one item of it. The item "balance" shown on page 1 of Plaintiffs' Exhibit 6 is not in my handwriting. It was written in later.

Q. Now, Mr. Isaacs, you sold the Bridge stock for $15,468.00 more than you paid for it; was that fair to these complainants?

Mr. SCHLESSINGER.—I object to that as not being proper cross-examination.

The COURT.—I will sustain the objection.

Q. Didn't this very Court in which this case is pending within a year establish the tail-end of this stock after the insurance sale of three weeks and after the H. C. Seynei sale of seven weeks as of the value in the inventory as $16,633?

Mr. SCHLESSINGER.—I object to that as not being cross-examination and an attempt to prejudice the mind of the Court.

(Testimony of Florence Cohn.)

The COURT.—It is a matter of record that the Court did so decide.

Mr. OLNEY.—I withdraw the question.

WITNESS.—(Continuing.) About four years ago there was an investigation by other companies than the complainants of Mr. Lloyd, an adjuster, at Portland. At that time the Phoenix and Hartford asked me about the purchase of some land in Oregon or Washington, somewhere up there, that I bought an interest in.

Q. But your integrity was very thoroughly questioned at that time, was it not?

A. I proved my contention, that I bought an interest in a piece of land and I had a deed, etc., to it, and that is all.

Testimony of Florence Cohn, for Defendant.

FLORENCE COHN, called on behalf of the defendant, testified as follows:

The defendant is my father. I helped take the cash. Each clerk [112] had a sales book, which was numbered, containing 50 blank sheets and a stub (index) in the back. When a sale was made the amount and character of the goods were written on the slip and put on file. An entry of the amount of the sale was made on the stub, and these books each night were left at the desk and on the following day a new book was given the clerk. The next morning we checked up the previous day's sales slips with the stubs to see if the clerks had added their books correctly and to find out whether they corresponded

(Testimony of Florence Cohn.)

with the amount of the sales slips. We also compared the stub with the slips to see whether any slips were missing. Mr. Bass and I then took the sale slips to Mr. Main's office where we added them on his adding machine to get the total sales, and we left them there. No one in Main's office assisted us and I never saw them again. Each day's sales were tied up in separate bundles, and after getting the adding machine totals, we went back to the office to ascertain whether the result that we obtained from the adding machine corresponded with the amount on the stubs. After that the stubs had served their purpose and we had no further use for them. We had no further use for the adding machine totals which we crumpled up and threw away. If a clerk had only used part of a book after it had been checked up, later on we gave him back the remaining portion.

On several occasions everything that was in the drawer was counted. There was always a notation made of how much money there was in the drawer.

I had nothing to do with the cash-book. I could not say if a comparison was made between the amount of money in the drawer and the amount indicated by the sales slips as daily receipts. I could not say if the amount in the cash drawer corresponded to the amount designated in the sales slips.

THEREUPON, DEFENDANT RESTED. [113]

Testimony of John Jeremy, for Complainants (In Rebuttal).

JOHN JEREMY, called by the complainants in rebuttal, testified as follows:

It is perfectly possible to put on or take off the tag which Mr. Isaacs testified could not be taken off without tearing. That is the way it is put on (illustrating). I have now put it in shape where it could have been on a piece of clothing and taken off. It don't have to be torn; just untie it.

When a sale was made these tags were taken off. The number of the tags was what we went by for the commission that we were to receive for the sale of the garment; these tags were taken to the cashier, at the same time that we took the merchandise, and either O.K.'d by Mr. Seynei or by Mr. Isaacs, and we kept these tags until Saturday night. The clerk kept these tags until Saturday night, and they were handed over to Mr. Isaacs or Mr. Seynei to be examined, and we could get our commissions on them; this was a part of our salary. That is the only commissions we received, on these tags. If we lost one of these tags it was that much loss. When the tag was surrendered that was a receipt for our commission. And it was so with the other salesmen.

Q. Now, Mr. Jeremy, I want you to explain to the Court how an agent or cashier by losing or destroying these sales indexes which have been referred to on this trial, could profit. Just take this book and take this book and take this package of sales slips at

(Testimony of John Jeremy.)

random and explain to the Court how that could be done.

A. These sales slips were furnished to us the first day of our sale. On that day we were given a sales book. The clerk's number was on the left and the date on the right. A carbon was inside of the two; both went up to the office together; one went to the customer and the other remained in the office with the cashier. The indexes showing the total number of sales were totaled up for the day by the salesman. If 17 sales were made we totaled up on number 17 in the index. On the next day, the second day, we got a new book; and on the next or third day we got the old book back again we had on the first day, with a new index which indicated the number of sales you sold on the first day whether it was 75 or 13 or 24. We never went by the book; [114] we simply went by the index. If there were 6 or 7 sales slips missing from the book, we had nothing to show; we simply had the index for the receipt.

Mr. OLNEY.—I don't know as the Court understands the explanation of the witness or not. I might ask the Court if he understands the explanation of the witness in regard to this matter; if it does not, I would like the privilege of asking him to go into it somewhat more in detail. It is a very important matter.

The COURT.—That is clear.

Mr. OLNEY.—That is all.

Cross-examination.

Mr. SCHLESSINGER.—Q. Do you testify from

(Testimony of John Jeremy.)

your own knowledge that that tag was ever put upon a piece of clothing or other article and taken off?

A. Yes.

Q. Who took it off?

A. The salesman took it off.

Q. What salesman? A. It has got my name.

Q. Did you take it off? A. Yes.

Q. When did you take it off?

A. During the sale.

Q. Where did you get this from?

A. Off the merchandise.

Q. How long have you had this in your possession?

A. I never had it in my possession.

Q. Where did you get it from?

A. I got it right here.

Q. Did you take this off yourself?

A. Yes, just now off that.

Q. Did you take this off a raincoat personally?

A. That is my writing on it.

Q. Did you take this off a raincoat personally?

A. I must have, because it has got my writing on it.

Q. Did you take this off a raincoat personally?

A. My writing is on it, and that is proof.

Q. When did you take it off?

A. I could not tell you the date.

Q. After you took it off what did you do with it?

A. Handed it to the cashier.

Q. Did you ever see it after that? A. No.

Q. Could you identify the raincoat you took it off?

A. God knows where it is now.

(Testimony of John Jeremy.)

Q. It did not contain any other marks or mark than this,—the mark that is on there?

A. No, but I am well acquainted with the merchandise, I marked things myself, and I surely know.

Q. I will ask you to examine these other tags and state whether or not they appear to be ragged in form? A. They are all O.K.

Q. Does that appear ragged in any way?

A. That is new merchandise.

Q. Was not that raincoat in the store?

A. It [115] was in the store.

Q. It was in the store?

A. But these are suits, and that is a raincoat.

Q. Did you tear this off carefully or just rip it off in the usual way?

A. It don't have to be torn off; just untie it.

Q. Did you untie it in that way?

A. That is a new raincoat.

Q. Have you ever examined that since the time you took it off, except to-day? A. No.

Q. This is the first time you have examined it?

A. This is the first time.

WITNESS.—(Continuing.) I made the biggest commission in the house. I should say I averaged as commissions three dollars a day.

Q. The amount of cash that you sent to the cashier corresponded with your slips?

A. I never knew of anything different.

Q. You made out the slips, didn't you? A. Yes.

The COURT.—He testified the other day that everything was regular, as far as he was concerned.

Testimony of Eva W. Benzion for Complainants (In Rebuttal).

EVA W. BENZION, called by the complainants in rebuttal, testified as follows:

I was employed by the defendant during the month of September, 1913, in North Yakima, Washington, as manager of a sale he was conducting there. I deposited the daily sales and then when there was any amount I would draw checks and send them to Mr. Isaacs in Seattle. I don't know the exact amount; the sales were somewhere around $7,000.00, and I sent him all with the exception of what the expenses were; his expenses were not very heavy up there.

Mrs. Isaacs is my sister and I am here under subpoena.

Testimony of R. De Lappe, for Complainants (In Rebuttal).

R. DE LAPPE, called by the complainants in rebuttal, testified as follows:

I was present in court this morning and heard the testimony of the defendant in regard to the interview he said he had with me at my office in this city. He never had any interview with me in connection with any matters relating to this case, either in my office or out of it. He never came to me in any way and offered to let me see his books of account or any data connected with this sale. [116]

We have employed Main on a great many cases. I have in my files letters to and from Mr. Main relating to this loss, including a statement made by

(Testimony of R. De Lappe.)

Mr. Isaacs to our company, made, I believe, late in the fall of 1913.

Mr. OLNEY.—These are all in evidence, Mr. Schlessinger.

Mr. SCHLESSINGER.—So I understand.

United States of America,
Northern District of California,—ss.

Now, at this time, the respective solicitors for the complainants and the defendant being present in court, on motion of the complainants and the Court being fully advised in the premises, hereby allows and settles the foregoing statement as and for the statement of evidence in the above-entitled suit on the appeal from the decree of this court to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby orders that the same be made a part of the record and filed in the above-entitled suit, and it is hereby further ordered and directed by the Court that the portions of testimony in the foregoing statement wherein the respective questions and answers of the several witnesses are therein reproduced in the exact words of said respective witnesses, be and the same are hereby directed by the Court to be allowed herein.

Dated this 27 day of November, 1917.

FRANK H. RUDKIN,
Judge of the United States District Court Sitting for the Northern District of California.

This statement may be approved.

LEON E. PRESCOTT,
Attorney for Defendant.

[Endorsed]: Filed Dec. 8, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [117]

In the United States District Court in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, Pa., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Complainants,

vs.

DAVID ISAACS,

Defendant.

Petition for Appeal.

To the Honorable, the Judges of the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

The above-named complainants, feeling themselves aggrieved by the decree made and entered herein on the 21st day of March, 1917, do hereby appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed here-

with, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal, be made.

Dated, August 24th, 1917.

JESSE OLNEY,

Solicitor and Counsel for Complainants. [118]

[Endorsed]: Filed Aug. 24, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

In the United States District Court in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, Pa., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Complainants,

vs.

DAVID ISAACS,

Defendant.

Assignment of Errors.

Now, on this twenty-first day of August, 1917, come the complainants above named by their solicitor Jesse Olney, and say that there is manifest error on the face of the record in the above-entitled suit and that the memorandum opinion filed herein on the 15th day of March, 1917, is erroneous, and that the decree made and entered in said suit on the 21st day of March, 1917, is erroneous, and unjust to the complainants, and the complainants hereby assign the same as error herein, for the following reasons:

I.

Because the District Court erred in its decision in refusing to accept the rule that the strictest interpretation of the law must be invoked against a trustee who has refused to account to his beneficiary and that the most rigid rule of calculation which the law affords should be followed in behalf of the *cestui que trust* as a substitute for such omission. [120]

II.

Because the District Court erred in its decision in holding and concluding every presumption throughout to be in favor of the trustee and against the *cestui que trust,* as every presumption should have been held and determined in favor of the latter, the trustee admittedly having derived a personal profit from the transaction.

III.

Because the District Court erred in holding and concluding that the burden was not upon the defend-

ant as the trustee of the complainants to render them a proper accounting.

IV.

Because the District Court erred in its decision in holding and concluding that concealment or unfairness do not necessarily entitle a principal to a judgment avoiding a sale by such agent to himself of the principal's property; and in so deciding the Court disregarded a fundamental rule of equity.

V.

Because the District Court erred in refusing to consider the great preponderance of evidence of a dozen witnesses not parties to the cause against the single self serving declarations of the trustee testifying for himself.

VI.

Because the District Court erred in its decision in not charging the trustee with the full value of the trust fund in his hands, he having entirely disposed of it and having commingled its proceeds with his own personal funds and merchandise and kept no separate account of either nor proper books of account.

The Coure erred in not requiring him as trustee to return to the [121] complainants the amount of this principal ($45,974) as per the first inventory, Plffs. Exhibit "C," plus his profits thereon, with interest, less the amount he has already paid.

VII.

Because it was the duty of this defendant Isaacs as trustee for the complainants to have frankly informed his fiduciary of all the circumstances sur-

rounding his secret sale in bulk to himself of their merchandise; and his failure to perform that duty was active concealment and constituted fraud; and the District Court erred in its decision in not so holding and concluding.

VIII.

Because the District Court erred throughout the trial and in its decision in holding and concluding and refusing to consider evidence of actual fraud by the defendant and then in its opinion upon which the final decree dismissing the complaint was entered stating the complainants had not fully and clearly established such fraud.

The Court doubly erred for it was not necessary for the complainants to prove nor for the Court to find expressly that the acts done by this trustee were done with a fraudulent and wrongful intent; because his acts themselves as disclosed by the evidence were of such a character, considering the fiduciary relationship of the parties, that the law imputes fraud.

IX.

Because the District Court erred in its decision in holding and concluding that the defendant as a trustee commissioned to sell and being himself the purchaser through another (Seynei) secretly of the property of his principals, the complainants, could recover commissions from them on such sale in bulk to himself without their knowledge. [122]

X.

Because this defendant upon such sale in bulk having withheld $2,218 from the complainants without their knowledge for secretly selling to himself

for $8,875, net, merchandise valued at cost price $31,153, and figured by himself in his own handwriting (Plffs.' Exhibit 16) at $24,603.39, should have been held to return these commissions to the complainants upon this accounting; and the District Court erred in its decision in not so holding and concluding and charging this trustee upon this accounting.

XI.

Because the evidence shows that Isaacs, this defendant, while trustee for the complainants, sold their merchandise secretly to himself for $8,875 net. Within a few hours afterward he sold the same identical merchandise to his firm of H. C. Seynei & Co. for $11,094. This personal profit of $2,219 on their merchandise belonged to the complainants and not to Isaacs, their trustee, and the District Court erred in not so holding and concluding in its decision and charging this defendant therewith upon this accounting.

XII.

Because the evidence showed the total net receipts from the entire second inventory of Bridge stock were $15,468 more than Isaacs, their trustee, paid the complainants for it; and the District Court erred in not so holding and concluding in its decision and charging the defendant therewith upon this accounting.

XIII.

Because the District Court in its decision in not considering the mute evidence of the defendant's own figures in his own handwriting (Plffs.' Exhbt.

16) as to the actual value of the [123] ($24,603) of the merchandise in bulk, this trustee claimed to have sold fairly to himself for $8,875 erred in not holding and concluding in its decision the said sale in bulk to himself clandestinely by this defendant to have been for an inadequate consideration, viz., one-third, as shown by the figures of the defendant in his own handwriting and by his admissions to Mr. Seynei regarding those figures; and the District Court erred in not setting aside the said sale in bulk as prayed for by the complainants.

XIV.

Because relative to this secret sale in bulk by Isaacs while trustee to himself, the District Court erred in holding and concluding that this defendant was empowered thus to sell the complainants' merchandise in bulk to himself without their full knowledge of all the facts as his principals; and that he could not be held accountable to the complainants for the personal benefits and profits he derived therefrom.

Because the District Court refused to consider the books of Isaacs firm of H. C. Seynei & Co. in evidence showing that whereas the defendant as trustee for the complainants sold the best of their merchandise on the fire sale for them at a loss of some 20% below their inventoried cost; he sold the remainder, after the secret sale in bulk to himself, the "fag end" for himself at a profit of 10% above their inventoried cost; both being based upon the original Bridge inventory cost as shown by the first inventory, Plffs.' Exhibit "C," stipulated to be correct by all parties.

XV.

Because as this sale in bulk to himself by this trustee was attended by gross irregularity; and collusively conducted for the benefit of this trustee against the interest of the complainants, and the merchandise sold thereon to himself at a greatly inadequate consideration; the District Court erred in its decision in not so [124] holding and concluding and setting aside the said sale in bulk as prayed for by the complainants and charging the defendant upon this accounting with the full inventory cost price at least of the complainants' merchandise ($31,153), or at least with the amount of his own depreciated inventory for his sale to himself in bulk ($24,653).

Because the District Court erred further in not charging this trustee in addition upon this accounting with his profits on the complainants merchandise made by him thereon after his transfer in bulk to himself, as shown by the Seynei books in evidence. [125]

XVI.

Because the District Court erred in its decision in refusing to consider and neglecting to refer to the summary in evidence (Plffs. Exhibit 19) of the chartered public accountants, Klink, Bean & Co., irrefutably showing the raw depreciation of the inventory taken by the defendant for the purposes of his own percentage bid for sale in bulk to himself of the Complainants' merchandise; a depreciation of the trust fund in his hands of $6,500 for his own personal gain; and the fact that these figures of this exhibit are iron clad in their absolute corroboration

of the evidence of Mr. Seynei and Mr. Jeremy of the willful depreciation of the inventory by this trustee, and of his statements made upon its taking.

This one exhibit alone was sufficient to compel the District Court to give judgment for the complainants in a sum at least equal to the total of the depreciated inventory. It proves beyond question the raw depreciation of this second inventory by this trustee for his own advantage to the detriment of the complainants.

XVII.

Because the District Court erred in its decision in holding and concluding and in its opinion saying:

> "I do not understand the correctness of the second inventory was impuned aside from the claim that the cost price of some of the goods was marked down."

The correctness of the second inventory was at all times "impuned" throughout the cause, by at least three witnesses, Mr. Seynei, Mr. Jeremy, and by the summary of the accountants Klink, Bean & Co., which proof not only showed the grossest frauds in its taking by this trustee in "marking down" the cost prices to the extent of some $6,500 for his own individual gain; but in fact that some of the best of the complainants merchandise was not placed in it at all but taken up stairs into the balcony to avoid its being included; and that this merchandise, overcoats, shoes, etc., amounted to some $5,000 in value, upon which no bid at all was made by Isaacs as his bid was only upon the inventory, in which this merchandise placed in the *balc* was not included. [126]

XVIII.

Because the District Court upon this wrong hypothesis above and its conclusions of law thereon erred in holding and concluding in its decision that there was no clear or satisfactory proof by the complainants, and in stating in its opinion that there was some testimony tending to show that the cost price, as disclosed by the second inventory, was cut down materially for the purpose of reducing the amount of the bid but that the Court was not prepared to say that fact had been established.

(A) The evidence was clear, decisive and manifold.

(B) Klink, Bean & Co. in making their table of comparison between the first and second inventories (Plffs. Exhbt. 19) exposed conclusively the fact that after a three weeks sale *there were more articles of a similar kind at a given price in the second inventory* than in the first; for the stock remained the same without the addition of new goods. The evidence was—

For instance: In the first inventory there were 152 pairs of pants costing $2.50 each. In the second inventory taken after a sale of three weeks, there were 354 pairs of pants costing $2.50 each; in other words there were 202 more pants at $2.50 on hand after the sale than there were at its beginning. This of course shows that prices were altered and must have been lowered, for an expert buying merchandise would *not raise* prices on *himself;* and in addition the high priced pants in the second inventory are mostly missing.

Another instance: In the first inventory there were 2 mackinaw coats costing $3.25. In the second inventory at the end of this trustees' sale of the complainants' merchandise at the end of three weeks there were 21 mackinaw coats costing $3.25; in other words there were nineteen more mackinaw coats at $3.25 on hand after a sale of three weeks than at its beginning.

The first inventory shows that $3.25 represented the *lowest* [127] *priced mackinaw coat* in the store; so that the price on the nineteen excess coats must have been *"marked down"* from the highest priced ones, *for there was nothing from which they could have been raised.*

(C) Plaintiffs' Exhibit 19 shows that these excesses occur continually throughout the departments, making over *two thousand "marking down" of prices.*

(D) The explicit evidence of Mr. Seynei upon the trial was that upon the taking of this second inventory the high priced goods were lumped into piles with the low priced goods, *and entered in lots in the inventory at the lower prices.*

(E) The evidence of Mr. Jeremy was equally explicit and to the same effect.

(F) The evidence of these two witnesses is irrefutably corroborated by the figures of the two inventories themselves as summarized by Klink, Bean & Co. in Plffs. Exhibit 19.

(G) The second inventory itself shows the merchandise was entered in lots and not taken piece by

piece thus conclusively corroborating Seynei & Jeremy.

(H) Isaacs this defendant did not contradict this evidence, nor is there any evidence of any nature to contradict Seynei or Jeremy or to explain in any way these *Two Thousand* discrepancies in the prices between the first and second inventories.

(I) A few days after the opening of the insurance retail sale of the merchandise of the complainants, their trustee formed a partnership for the express purpose of buying in the balance of the stock in bulk represented by this second inventory. It is beyond the fondest realms of the imagination to contemplate this defendant raising prices on himself; and the report shows prices could not have been *marked up.*

(J) The evidence and stipulations on the trial throughout was that first inventory was correct absolutely, included everything, and taken and checked by disinterested parties, therefore the changes in prices were [128] exclusively in the second inventory and constituted intentional "marking down" by this trustee for his own personal gain against the interest of the *cestui que trust.*

XIX.

Because the District Court erred in its decision in holding and concluding that

> "the utmost the complainants could claim would be to call upon the defendant to account for the amount of his bid, viz., 45% of the cost price."

(A) The evidence shows clearly the most outrageous fraud in the physical complexion of that bid

alone. The complainants introduced in evidence (Plffs. Exhbt. 21) a carbon copy of the actual bid prepared by the defendant and placed by him in the hands of his dummy (Seynei) who testifies he signed it and handed back to the defendant who had it in his possession at the time he sold the complainants merchandise clandestinely to himself in bulk. This bid was 47% of the depreciated second inventory. When the defendant found there was no *bona fide* competitive bids he dropped down this bid in his hands 2% from 47% to 45% thus cheating the complainants of $492 on their own merchandise; for which sum, if there was nothing else in the cause they should have judgment.

(B) The evidence of the witnesses Seynei and Jeremy, conclusively corroborated by the figures of Klink, Bean & Co., the expert accountants, show an intentional depreciation of this second inventory by this trustee for his own benefit of $6,500 (to say nothing of the $5,000 of the best of the complainants merchandise stored in the balcony and not included in the second inventory); and his figures are therefore show false and untrue, irrespective of the actual fraud upon his fiduciary, these complainants, who are entitled to that sum in judgment, at least.

(C) However, the least that the complainants "could claim" would be the amount of the first inventory, $45,974, less the amount [129] turned over by the defendant and the actual *bona fide* expenses.

(D) Or the amount of goods in the sale in bulk, $31,153 plus his profits thereon as shown by the

Seynei books in evidence.

(E) These complainants certainly "could claim" themselves entitled to judgment for the commission, $2,218, kept by this defendant on his sale of their merchandise secretly to himself in bulk.

(F) And these complainants certainly were entitled to judgment for the personal profit their trustee made *instanter* upon his sale in bulk to himself for $8,875 and immediately transferring it to his partnership for $11,094, and causing a credit to be placed on the Seynei books in his favor as having paid these companies that sum.

XX.

Because the District Court in its decision erred in not disregarding entirely the testimony of George C. Main and in not considering the defendant Isaacs' own testimony that he set aside for Main $4,000 of the stock of the Coast Fire & Marine Ins. Co. (under whose name the sale in bulk by Isaacs to himself was advertised) and in not therefor holding and concluding Main to be biased and a prejudicial witness and possibly pecuniarily interested in the transaction.

XXI.

Because the District Court erred in its decision in holding and concluding that George C. Main, an independent insurance adjuster and not in the regular employ of the complainants, had authority to represent or bind them after his adjustment of the fire loss for them with the assured by their [130] purchase of the stock of merchandise from the assured for $34,300 cash.

(A) Main himself claimed no further authority.

(B) All Main's correspondence with the complainants is in evidence and shows no further authority was conferred on him.

(C) Main testified when the stock went into Isaacs' hands he had nothing further to do with it.

(D) After that Main never examined the stock nor did Isaacs make any reports to him.

(E) Main himself considered his services at an end for he rendered his bill Sept. 8, 1913, and was paid and there is no record of any further charge; so that any further interest he took was entirely a moral as distinguished from a legal one and purely as a volunteer.

XXII.

Because the District Court erred in its decision in holding and concluding that the authority of an adjuster lies in contract. In the State of Washington the authority of an adjuster is purely statutory there and defined by the codes. The complainants conferred no authority on Main except that conferred by the Washington statute which defines the authority of an adjuster within the state. There was no contract; no evidence of any contract. There is no evidence that the complainants knowingly permitted Main to exercise any authority after the stock passed into Isaacs hands; nor had they any knowledge of any of Main's acts after that; nor is there any evidence to show that Main communicated with them concerning the disposal of the stock either at retail or in bulk after Isaacs took control.

XXIII.

Because the District Court erred in its decision in holding and concluding that further authority from the complainants to Main must be presumed after his adjustment of the Bridge fire loss for them, [131] through their purchase of the stock.

In the absence of direct proof no presumption of authority to Main to perform other duties and so bind the complainants can arise from the mere fact that he acted as an adjuster. No evidence was presented showing that any additional authority was conferred on this adjuster by the complainants which would have the effect of empowering him to waive any of the complainants' rights or bind or estop them in the present cause.

XXIV.

Because the District Court erred in its decision in holding and concluding and saying in its opinion that the complainants were not represented at all if not by Main.

This is conclusively determined by the pleadings. The First Amended Bill of Complaint, Paragraph II, explicitly sets forth that the defendant did "actually take over into *his exclusive and sole possession and control* their said stock of merchandise." There is no denial by the answer nor is the allegation controverted anywhere. Isaacs' contract under the pleadings was with the complainants direct and Main had no authority whatever over the stock in the defendant's hands.

XXV.

Because the District Court erred in its decision

in holding and concluding that the defendant rendered his statement to Main.

(A) Isaacs rendered a statement which was forwarded to the companies through Main.

(B) There is nothing in Isaacs' statement to show that he was the purchaser at bulk sale nor is there anything in the record to show Main acted otherwise than as a volunteer in forwarding it to the Companies for Isaacs.

XXVI.

Because the District Court erred in its decision in holding [132] and concluding that Main was fully cognizant of all the facts relating to the sale in bulk by this defendant to himself as the complainants' trustee; for the following reasons:

(A) Main did not know that Isaacs closed the insurance retail sale for the *express purpose of buying in the balance of stock himself* in bulk.

(B) Main did not know that Isaacs formed a secret partnership four days after the opening of that insurance sale for that very purpose and had made arrangements for renewing the lease on the Bridge store.

(C) Main did not know the sale in bulk was a fake.

(D) Main did not know there were no *bona fide* bids.

(E) Main saw no bids.

(F) Main did not know the name of Harry Seynei was used as a blind.

(C) Main testified he was out of town when the merchandise was advertised for sale in bulk, and did

not know it was advertised on one day and that Isaacs made no proper effort to obtain competitive bids.

(H) Main did not know that Isaacs lowered his own bid from 47% to 45%, thus reducing the amount of his bid $492 and thereby making a false total of $11,094 instead of $11,586.

(I) Main did not know that Isaacs made the second inventory of $24,653 for the express purpose of a basis for his own percentage bid.

(J) Main did not know when Isaacs upon the sale in bulk, claimed the highest bid was 45% of the original Bridge cost prices that Isaacs had depreciated those cost prices thousands of dollars in that second inventory. (*Main repeatedly states he understood that second inventory was taken at Bridge cost prices the same as the first.*)

(K.) Main did not know that in the taking of that second inventory as a basis for Isaacs bid the high priced goods were lumped into bundles and mixed with the low and entered in that inventory at [133] prices far below the original Bridge cost prices on the sales tags; for he repeatedly states he understood the bid was 45% of the original Bridge inventory cost prices, and no depreciation allowed on account of any damage.

(L) Main testifies he did not examine the stock at the time of the sale in bulk by Isaacs to himself.

(M) Mr. Seynei testified that Isaacs intentionally concealed from Main the amount of goods left after the insurance sale and also that this defendant said he did not want Main to know how much stock

was left on the premises after that sale.

XXVII.

Because the District Court erred even on the hypothesis of Main's agency in holding and concluding that he had full knowledge of all the matters set forth in the preceding assignment sufficient to bind and estop these complainants from a full recovery in the present cause.

XXVIII.

Because the District Court erred in holding and concluding that an agent (if Main be taken to be one after the adjustment of the loss) could, by his silence, authorize, ratify or sanction an act he could not expressly authorize, sanction or approve; for the reason that Main, upon such hypothesis was an agent, a trustee of an express trust, and he could not permit or authorize Isaacs to do that with the trust estate which he could not do himself; and it was a perversion of the law for the District Court to so hold.

XXIX.

Because the District Court in holding in its decision and concluding that this defendant could claim the benefit of any contractual relation in agency while committing a tort, erred and disregarded one of the fundamental principles of equity. [134]

The defendant is shown by the evidence in the commission of a tort (the lowering of his bid on sale in bulk to himself, his depreciation of the second inventory for the purposes of his percentage bid while trustee against the interest of the *cestui que trust,* his

instructions to his salesmen upon its taking, his forming his secret partnership to conceal from his fiduciary his connection with their property and ownership of it, his fake sale in bulk to himself, and his fake auction on the sale in bulk).

XXX.

Because the District Court erred in its decision in holding and concluding

> "the fact that the commission (on the sale in bulk by this trustee to himself) was claimed and held out was known to Main, and through him to the plaintiffs, and no complaint was made by them by reason thereof";

for the reason that the evidence shows Main was not in the employ of the plaintiffs at the time. He had no authority from them and such cannot be presumed. They had no knowledge of the sale in bulk by their trustee to himself and that he had charged them with commissions on his own clandestine purchase. Main was not a general agent but merely an independent adjuster employed sometimes to adjust independent losses; and had rendered his bill and final report to the complainants on September 8th, 1913, and had been paid off in this matter. There is no evidence that plaintiffs had at any time knowledge of the sale in bulk. Isaacs concealed it from them in his statement and made no mention of it. [135]

XXXI.

Because the District Court erred in its decision in holding and concluding

> "The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake,"

and its inference thereon that there was no other proof and that his failure to keep proper books of account stood "alone" upon the record. Such, however, are not "alone" upon the record as the evidence shows this trustee the day he opened the insurance retail sale for the complainants going to an out of the way private banker and hiring a safe deposit box and visiting it an average of three times a week during the complainants' sale although he had his own personal bank account in the Seattle National Bank and the use of a neighbor, M. Aaronson's safe; his bringing his wife and daughter over one thousand miles from San Francisco to handle the complainants' cash; his fraud in lowering the bid for his sale in bulk to himself from 47% to 45%; his fake auction for sale in bulk his fraudlent lowering of the cost prices in and depreciation of his second inventory for the purpose of his own percentage bid thereon; his refusal to give the complainants an accounting; his reliance upon the technical defenses of stated account, laches, and statute of limitations in an equity suit for an accounting brought by his *cestui que trust;* [136] his offering in evidence only $2,850 of outside checks from North Yakima as deposited in the Seattle National Bank when his manager of his North Yakima business testified the checks from North Yakima were nearly $7,000; his concealment of his bank-books and check-books and

stubs from his expert accountant Herrick; his offering copies of deposit slips from the Seattle National Bank amounting to only $19,744.26 as deposited there while the Bank's auditor testified in realty he deposited $20,577, during the insurance sale. His concealment of the cash register totals, the adding machine totals, and salesmans' indexes from the Court and his own witness Herrick, which were the chief proof if any of the accuracy of the selected sale slips offered in court in loose leafs and to show what and how many were missing; Herrick, his expert accountant, having admitted it was impossible for him to determine regarding them with the data which Isaacs furnished him for neither the cash-book entries nor sale slips were a complete record of the individual sales. Even his own self-serving figures showed his sale slips were short nearly 1500 articles of the actual number sold. His claiming he sold merchandise at retail for the complainants for 20% below inventory when the evidence of his own salesmen was that on that sale it was marked and sold 20% to 30% above its inventory cost; and this trustee introduced no evidence to contradict this other than his own self-serving declarations and figures. His taking receipts at his own sale from the clerks but not for the clerk hire at his sale as trustee for the complainants of their merchandise. **[137]**

XXXII.

Because the District Court erred in its decision in holding and concluding this trustee's sale slips had not been impeached and that practically all the goods

had been accounted for and that the complainants had failed to show their trustee incorrect up to the time of the sale in bulk to himself.

(A) The burden was not upon the complainants, but upon their trustee to establish his good faith and the integrity of his figures and statements.

(B) His total amount of sales ($17,800) as shown by his sale slips was 20% below the inventory cost prices of the merchandise; while the evidence of five of his own salesmen and of Mr. Bridge and Mr. Bailey showed that the merchandise on the insurance retail sale was marked and sold 20% to 30% above the same inventory cost prices.

(C) The evidence of Mason, Main, Seynei, and Jeremy was that such a stock at a fire sale should bring 20%, to 50% more than at an ordinary sale.

(D) Mason testified that this stock should have been sold at inventory prices; that the best would sell first and should bring way above inventory.

(E) The evidence of the Seynei books is that after the best of this Bridge merchandise had been sold at the insurance sale, the balance of the same stock at the sale for Isaacs' partnership of H. C. Seynei & Co., brought 10% above the same inventory cost.

(F) The evidence of Mr. Jeremy, Mr. Seynei, and Mr. Bailey, was to admissions by the defendant to them before the close of the insurance retail sale was that Isaacs before that sale closed told them and others that he had already "made good his guarantee ($18,100), his commissions and all expenses, and was on velvet."

(G) The evidence of the Seattle National Bank by its auditor as a witness shows over $4,000 more money deposited by this trustee during his sale at retail for the complainants than the amount purported by his selected sale slips offered in Court, less clerk hire, not to mention [138] sums in currency probably deposited in his private safe deposit bax with Wm. D. Perkins & Co., private bankers.

(H) The evidence that the money for clerk hire was all paid out of the cash drawer, and was not included in the amounts deposited in bank.

(I) The evidence of Mr. Seynei was that during the rush of the first few days and whenever they were very busy, sale slips were not made out at all as there was no time.

(J) The evidence of the defendant himself shows that the entries in his so-called "cash-book," of sales, were made entirely in his own handwriting, although the balance of the book was kept by someone else. This trustee produced no evidence to corroborate these purported cash sales (although such evidence existed) except these loose leaf sale slips unverified by any check whatever.

(K) The evidence of the defendant's witness Herrick was that these slips were not a complete record of all the sales.

(L) The evidence shows the original cash register totals, the adding machine totals, and the salesmen's indexes by which alone these slips could be checked up, to be missing, and their absence and nonproduction unaccounted for by the defendant. His witness

Herrick testified that these indexes are the chief check on sale slips.

(M) The evidence was that all these existed at time of the insurance retail sale.

(N) The defendant failed to produce them.

(O) The evidence shows not all the goods sold even accounted for by the sale slips produced; and that this trustee did not instruct his two experts to check up the number of articles, but did this himself; yet his own self-serving declarations show the sale slips fell short nearly 1,500 articles. The evidence shows his declarations were inaccurate and contradictory and unsubstantiated by any other evidence than his own statements. **[139]**

XXXIII.

Because the District Court erred upon the trial and in its decision in its acceptance over complainants' objections of the so-called "Report" (Defendant's Exhibit "B"), of the hired expert Herrick, admittedly made up from selected, self-serving data furnished him *ex parte* by the defendant before the trial and without reference or consideration of the evidence of the complainants as to the facts and based upon insufficient data, upon copies of papers without the absence or destruction of the originals being accounted for, and in the total absence and withholding of evidence such as adding machine totals, cash register totals, and salesmens' indexes, by which alone their accuracy could be established.

The Court's unquestioning acceptance and reception in evidence of this letter proof report which was a most glaringly imaginative composition as bearing

upon the accuracy of defendant's figures and even upon his probity and honesty, was absurd and gross error, and repudiation of all the fundamental principles of evidence for the following reasons:

(A) The witness Herrick himself stated it was not a complete record; that it was not based entirely upon original documents; that it was in part a conclusion, not a statement based on facts.

(B) Mr. Herrick stated it was an opinion based solely upon the data furnished him some weeks before the trial by the defendant; and that *it was only correct upon this basis upon which it was prepared.*

(C) Mr. Herrick said he did not know whether all the data was furnished him, that he had no way of determining whether all the sale slips were furnished him; some might have been missing; also the accuracy of the individual sale slips was doubtful. **[140]**

(D) Mr. Herrick testified that no salesmens' indexes, cash register totals, or adding machine totals whereby these sale slips and cash entries could be checked up were furnished him by Isaacs, although they are always included in the usual record of each day's transactions. That indexes are the chief record of checking sale slips.

(E) That the book designated by Isaacs as a cash-book was not properly a cash-book; it was merely a book of record; it was simply a primitive, crude record of sales and disbursements, an abominable record.

(F) The entries in this "cash-book" were made in lead pencils and do not represent each individual

sale, but "purport" to be a record of the total aggregate sales made each day. There is in this "cash-book" no complete record of each individual sale and there is nothing appearing in the sale slips themselves showing them a complete record of all the sales.

(G) Herrick testified the entries in this "cash-book" were made in accordance only with the method that was used and only "appear to represent the total daily sales," and that it is only self-evident that the cash entries made up from the amount in the cash drawer at night do not include money not put in or taken out during the day.

(H) Herrick himself testified the actual accuracy of every individual slip is doubtful and that he only examined the amount totals of sales.

(I) Mr. Herrick was not requested by the defendant to check up the number of articles on the sale slips sold to see if they corresponded with the correct number of articles that were actually sold as designated by the difference in the two inventories.

(J) The vouchers were not originals, but all copies and do not verify the claimed items of expense.

(K) The bank deposit slips which this expert examined were not originals, but copies seemingly made by the defendant. These, [141] while rejected and not admitted in evidence by the Court, amounted to only $19,744.26, and are only of value in showing that not the entire data was given this accountant by the defendant covering his deposits in the Seattle National Bank, for the testimony of the

auditor of the bank, E. K. Reilly, called by the complainants as a witness, shows that the defendant during the same period deposited $20,577.

(L) This data of the deposit slips having been rejected by the Court, Herrick's "report," based in part upon rejected evidence, is worthless for any purpose.

(M) The total amount of North Yakima checks which was furnished by the defendant to Herrick some weeks before the trial for the purposes of his report was only $2,850.

Mrs. Benzoin, Isaacs' own sister-in-law, who managed and conducted the business for him at North Yakima, testified upon the trial she forwarded to the defendant in Seattle nearly $7,000 in checks.

Isaacs confesses he commingled these two accounts and had no other bank account.

(N) Mr. Herrick testifies Isaacs did not let him examine his original bank-book and check stubs.

(O) The excess in deposits in the Seattle National Bank as shown by the "report" of Issacs' expert, amounting to $930, was accounted for by him by a mere conclusion that it embraced "some other money" than that coming from the insurance sale; this conclusion being supported by self-serving conversations *ex parte* with this defendant before the trial.

(P) Almost the entire "report" is an opinion or a conclusion of this accountant that the records "appear" and "purport" to be so and so, and "unless they are false" they do this and that. These complainants claim they are "false." At no time in

making up his conclusions does he speak of facts, but always of suppositions. [142]

That during the trial of said cause, the said Herrick, the author of said "Report," was called as a witness for the defendant; and the following proceedings were had relating to said "report" and the data before the trial furnished the witness by the defendant, and upon which said report was based:

Mr. SCHLESSINGER.—(Referring to said report.) We will ask that this be marked as our exhibit.

Mr. OLNEY.—Are you offering it?

Mr. SCHLESSINGER.—Yes.

Mr. OLNEY.—I object to it until we have the data upon which it was made. Conclusions of experts are not admissible in evidence until the foundation is laid for them by introducing the other papers and documents.

Mr. SCHLESSINGER.—Unquestionably, if that is not shown, it does not amount to anything. He testified to having made this from an examination of certain data. That data is in court.

The COURT.—Do you expect to identify that later?

Mr. SCHLESSINGER.—Certainly, the testimony has gone in somewhat out of order.

The COURT.—The objection, of course, is well taken, because the report is somewhat out of order, but if counsel desires to get through with the witness—

Mr. SCHLESSINGER.—I am simply wishing to expedite matters.

(Testimony of Lester Herrick.)

The COURT.—Of course, unless the report here is substantiated by the testimony offered later, the Court will not consider it. I will not rule on the objection at this time, but I will admit it; if it is not substantiated by the books I will reject it.

Mr. OLNEY.—I ask leave to ask the witness a few short questions.

Mr. SCHLESSINGER.—Oh, no; I shall object to that now, because I will substantiate it. If it is not substantiated it may go. **[143]**

Mr. OLNEY.—I want to ask the witness in regard to certain data that he has named. I am objecting to this report, and I desire to examine the witness regarding his data.

Mr. SCHLESSINGER.—I object to any cross-examination at this time.

The COURT.—Proceed with your examination of the witness, and if it is not substantiated I will strike the report. I will give you full opportunity for cross-examination. I will not rule on your objections at this time, but I will admit it; if it is not substantiated by the books it will be rejected.

Mr. SCHLESSINGER.—I will ask you whether or not in the course of your examination you examined a cash-book or what purported to be a cash-book, covering the sales of 19 days. A. Yes.

Q. Is that cash-book in court?

A. Yes, it is here.

Q. I will ask you whether or not you examined the entries in that cash-book? A. I did.

Q. State whether or not they appear to have been made in the due and regular course of business.

(Testimony of Lester Herrick.)

A. They did, *in accordance with the method that was used.*

Mr. SCHLESSINGER.—We will now offer in evidence this cash-book.

Mr. OLNEY.—We object to it on the ground the proper foundation has not been laid.

The COURT.—The same course will be pursued.

Mr. SCHLESSINGER.—I will ask you if in the course of your examination you examined certain sale slips? A. Yes.

Q. I will ask you whether or not these are the slips you examined.

A. Yes, those I believe, to be all the tags we examined.

Mr. SCHLESSINGER.—We ask that these sales slips be admitted in evidence.

The COURT.—They will be admitted, assuming that they will be hereafter identified. It is merely a question of the order of proof.

Mr. OLNEY.—This is something that is going beyond the mere order of proof. He could bring in half of these slips; or he could bring in two-thirds of these slips. How is it to be determined what he has left out? [144]

The COURT.—Of course, if the report is not substantiated by testimony offered later it will go by the boards and amount to nothing.

Mr. SCHLESSINGER.—Now, if your Honor please, I will offer in evidence a cloth-covered book—I might do this, to shorten the offer, I might offer in

(Testimony of Lester Herrick.)

evidence all of the books and records appearing upon page 1 of Mr. Herrick's report.

The COURT.—They will be received for the purpose of identifying them as the books forming the basis of the report, but will not be admitted in evidence until they are further identified.

Mr. OLNEY.—That ruling, I presume, applies also to the sale slips.

The COURT.—That applies to everything referred to in the report.

Mr. SCHLESSINGER.—Q. Mr. Herrick, from your examination of these records and data submitted, are you satisfied that the statement rendered, that is, is it your opinion that the statement rendered by Mr. Isaacs to the insurance companies was correct.

A. My opinion is based entirely upon this evidence which was presented to me, and so far as I can form an opinion from an examination and a careful consideration of these papers this statement was correct.

Mr. SCHLESSINGER.—Now, your Honor, we will ask that these records, and data, documents and papers specified on page 1 of the report of Lester Herrick be admitted in evidence.

The COURT.—All these papers referred to by this witness will be marked in some way to identify them as the papers which he used in making up his report.

Mr. SCHLESSINGER.—I think your Honor has ruled that these may be admitted as one exhibit.

The COURT.—I am only admitting them conditionally. I am admitting them for the purpose of identification in connection with its report.

(Testimony of Lester Herrick.)

Cross-examination by Mr. OLNEY.

Q. Your report is made up from these sale slips and books exactly as you originally found them?

A. Yes. This examination, as appears upon the first page was investigation and partial conclusion upon all the things which were given us that appeared to have anything to do with [145] the preparation of a statement of this transaction; and they are all recited on the first page and are all here. They mainly consist of this cash-book or record-book and the sales slips and these vouchers.

Q. Your report has been made up from what has been furnished you? A. Yes.

Q. You don't know what has not been furnished you? A. No, I do not.

Q. You did not compare each separate sale slip?

A. There is nothing to compare it with.

Q. That is what I thought.

A. What could there be that they could be compared with, unless there was a complete record of the individual sales?

Q. There is no complete record, is there?

A. No, there is none.

Q. Did you also see the original adding machine totals of these slips? A. No.

Q. Or cash register totals?

A. No, nothing except what I have referred to.

Q. Then you saw no other record than these slips and these books? A. No.

Q. If any slips are missing, Mr. Herrick, they were not entered in the book, were they? You do not know how many slips were missing, do you?

(Testimony of Lester Herrick.)

A. No, I don't know whether any slips were missing or not.

Q. Mr. Herrick, if it should appear that upon this sale for which these sale slips have been produced here there were indexes made by each clerk showing the amount of each individual sales slip, and the total cash sales, which was turned in each night to this defendant, should not those indexes be produced here and accompany these sales slips in order to make a complete record?

A. Yes. These books contain, usually, 50 of these slips with carbons and there is also in the book a sheet having lines and numbered **[146]** spaces from 1 to 50, for the purpose of taking an entry of the total of each individual slip, and upon the conclusion of the day or the completion of the use of the slips, he figures his total and it becomes a record that enters into the entire record constituting an audit of the transactions of the day.

The COURT.—Totaled up by the salesmen?

A. It is totaled by the salesmen and returned first to the proper office and in an organized institution becomes a part of the organization records of the business of the institution.

Q. These sales slips in the book are removable?

A. Yes.

Q. This index in the book is returned at the close of the day to the cashier?

A. Yes, that is the proper practice.

Q. And that is the chief record to check, the sales record?

(Testimony of Lester Herrick.)

A. Yes, it is the means of carrying on the check of individual sales to the complete recapitulation.

Q. It also checks up the sales slips, does it not?

A. Yes.

Q. Your report, I believe, does not include these indexes? A. No.

Q. There were none such furnished you?

A. No.

Q. I believe you also stated you did not have furnished to you any of the original adding machine totals or cash register totals of these sales by which they could be checked up. A. No.

Q. Your only knowledge of the North Yakima deposits are the four cancelled checks of September 8, 9, 16, and 22, which have been produced here in Court. A. And the checks themselves.

Q. Your only knowledge of these deposits are the four individual checks which have been produced here? A. Yes.

Q. Have you examined Isaacs' Bank Book of the Seattle National Bank, and the stubs of his checkbook covering the period of your report?

A. No, I have not.

Q. These were not produced to you and they are not among the data which you have offered?

A. No.

Q. Were you instructed to prepare totals of the quantities of the various [147] articles of merchandise sold at this sale in order to check the same up with the inventories? A. I was not.

Q. Now, will you look at this record-book, Defendant's Exhibit "C." If this is a book made up from

the total cash in the drawer each night at the conclusion of business, then is it not also an incomplete record in that it might not show the sums of money taken out during the day, or not put in the drawer during the day?

The COURT.—I do not think it is necessary to ask an expert witness to deduce conclusions which are inevitable. If money was taken out of there the book, of course, does not show it.

During the course of the defendant's testimony in his own behalf later in the trial, the following occurred:

Mr. SCHLESSINGER.—We will offer in evidence the various slips, documents and data identified by Mr. Herrick yesterday afternoon and referred to specifically on page 1 of his report.

Mr. OLNEY.—We object to the admission of this insufficient data in evidence on the same grounds as offered to the partial offer of these other copies. These are not original records; every one of them are copies; the originals are unaccounted for. As far as this exhibit "C" is concerned, it appears that most of the book is in the handwriting of a bookkeeper, and kept by a bookkeeper who has not been produced upon the trial of this action.

The COURT.—Under the testimony, the book was kept under the immediate supervision of the defendant, he paid the money and the bookkeeper made the entries there, practically in his presence. I will overrule the objection to the book. I will admit the sale slips in evidence upon the identification made. The different receipts and vouchers the witness has testified that he paid I will also admit. The objec-

tion to the deposit slips will be sustained.

That the Court erred in admitting in evidence the sale slips unaccompanied by the usual checks of salesmens indexes, adding machine and cash register totals, and different copies of receipts and vouchers, and the so-called record-book, Defts. Exhibit "C," and in overruling the complainants' objections thereto. [148]

XXXIV.

Because the District Court in its decision and reception of evidence erred in accepting unquestioningly over complainants' objection this opinion of defendant's hired expert Herrick, as to the defendant's own honesty and integrity based upon self-serving data selected by the defendant *ex parte* weeks before the trial and placed in his witness' hands. Such opinion was not receivable in evidence unless based upon a thorough review of all the evidence in the case, and not upon *ex parte* statements of the defendant alone respecting his own honesty and integrity and to serve his own purse, regarding his dealings with the complainants. Such decision as to honesty and integrity was for the Court upon the entire evidence upon the trial to determine under the rules and decisions of equity. [149]

XXXV.

The District Court erred in holding and concluding in its decision and accepting the said book of record or "cash-book" so called, Defendant's Exhibit "C," as a proper book of account of the trust fund of *sufficient in* equity upon an accounting by

this trustee with his *cestui que trust* of his dealings with the trust fund.

The defendant's own witness Herrick testified, "The record is very abominable accounting—the records from the standpoint of criticism, are abominable." It was the duty of this trustee to have kept proper books of account of the trust fund in his hands and his failure to do so constituted a strong presumption against him. Under the law and decisions this exhibit was manifestly not a proper book of account, especially in the absence and nonproduction of the person making most of the entries.

XXXVI.

In the absence of proper books of account by this trustee of the trust fund in his hands the District Court erred in not charging him with the full value of the fund in a sum aggregating at least its inventoried cost value. In the absence of proper books of account the burden rested squarely upon the defendant.

XXXVII.

Because the District Court erred in its decision and upon the trial in accepting the copies of the various original claimed vouchers mentioned in Herrick's "report" without the destruction or absence of the originals being accounted for; and permitting the paid expert of the defendant upon these unverified copies, to give an opinion as to whether the defendant had made a satisfactory accounting. That was for the Court under the rules and decisions of equity to determine. [150]

XXXVIII.

Because the District Court in its decision erred in holding and concluding that every item in this defendants expense account was satisfactory and fairly established.

(A) The only evidence was the production of unverified copies of receipts without the originals being accounted for, even these not checking Isaacs statements.

(B) The evidence shows this trustee produced no receipts from his employees for the item of clerk hire ($1,655.21) although it shows Isaacs required Mr. Seynei, his partner, to take them for record on their partnership sale of the balance of this same merchandise.

(C) These partnership books are in evidence and show that at the same location, same rent, same light, labor, etc., with largely the same stock, this trustee's expenses when in business for himself were one-third less than when he did business for these complainants.

(D) Mr. Seynei, who managed the insurance retail sale for this trustee testified Isaacs figures of $1,655.21 for clerk hire were excessive; that not over $800 was paid out under that item on the insurance retail sale by this trustee.

XXXIX.

Because the District Court erred in its decision in holding and concluding and inferring the value of the trust fund in the hands of this trustee was only about $18,000 and that other parties concerned did not differ widely upon that question.

(A) Even this trustee admitted and the evidence shows he sold about one-third of it for $17,800. [151]

(B) The Seynei books show that on the balance of the same stock this trustee realized about $24,000, thus making some $41,800, which must be accounted for and does not include Isaacs' secret sales.

(C) Bridge the owner testified his stock AFTER the fire was worth over $50,000.

Seynei, the manager, and acquainted with the stock for many years testified the stock of merchandise *as* worth $60,000 at retail.

Jeremy, the head salesman, testified the stock of merchandise was worth from $60,000 to $65,000 at retail.

(D) The adjusters Main and Mason and Mr. Jeremy testified that for the purposes of a retail fire sale such a stock of goods was worth from 20% to 50% more than at an ordinary sale; and that such is the case is really axiomatic with anyone acquainted with handling merchandise for fire sales. Also they testified an estimated loss is not a total loss. Goods can be reconditioned and sold at a profit.

There was no rebuttal by this trustee or contradiction in any wise of these statements except his own self serving figures and selected data in the absence of proper books of account.

(E) Mason also testified he personally would never have sold the stock to the companies for less than $36,000 at a wholesale price; and that the merchandise should have sold at retail over and above

the inventory cost price.

(F) Main testified that Isaacs guarantee of $18,100 was much less than the value of the salvage even from a wholesale standpoint. [152]

XL.

Because the District Court erred in its decision in holding and concluding that $34,300 was the actual sound value of the stock.

(A) The sound value agreed upon is shown by the evidence to have been a figure reached only in compromise and in no way represented the actual value of the merchandise. Both Main and Mason testified explicitly upon this point.

(B) The evidence shows Main wrote to the complainants at the time (Main's Report, Sept. 8, 1913, Plffs. Ex. "2–N"):

> "Finding I could not agree with Mr. Mason I took the other tack of getting the sound value down as low as possible with the idea of eventually taking the stock."

(C) Main testified it was his idea to buy as low as possible at wholesale and resell at retail and thus net a considerable amount for the companies.

(D) The evidence shows $34,300 was purely a purchasing price, not agreed to by Mr. Bridge, the owner, but objected to by him as being ridiculously small, but by his assignee for a creditor who was only interested in getting a quick settlement to cover the amount of its individual claim amounting to some $15,000.

(E) The evidence shows Mason testified that both he and his experts considered the actual value considerably more.

(F) This amount was a bulk purchase and did not represent the value at retail sale. [153]

XLI.

Because the District Court erred in its decision in holding and concluding that the statement rendered by this trustee and set forth in the complaint, which was forwarded to the companies with his purported "net balance" of $1,049 became an account stated between the complainants and himself as their trustee.

The District Court erred in its citation of cases and rule of law on this point to the effect that the burden of proof rested upon the complainants; the cases cited being where the fraud or error was apparent upon the face of the account. In the present cause Isaacs' statement to the complainants does not reveal his sale in bulk secretely to himself; nor his charge of commissions on such sale; and his fraud upon his beneficiary is not apparent from the closest scrutiny of the account.

XLII.

Because the District Court erred in its decision in holding and concluding that the complainants acquiesced for more than two years in their trustee's account without question or protest. The evidence shows his fiduciaries had no knowledge of the frauds of their trustee nor anything to put them on inquiry until the revelations in the Seynei suit against Isaacs in the federal court. Their action was then immediate.

XLIII.

Because the District Court erred in its decision

upon the wrong hypothesis of acquiescence in imputing laches to the complainants; and holding that laches short of the statute of limitations could be set up by an agent; the statute of limitations in actions for an accounting in California being four years; and the present action having been begun nineteen months before the statute expired. [154]

XLIV.

That the said decision of the District Court is against law and against equity.

That the evidence is insufficient to justify the decision of the District Court herein.

That the District Court in its decision erred in holding and concluding that the Complainants' bill should be dismissed and in its order and decree dismissing their said Amended First Amended Bill of Complaint and in awarding costs to the defendant upon such dismissal.

WHEREFORE, the complainants pray that the said decree dismissing their bill be reversed, and that the Honorable, the United States District Court for the Southern Division of the Northern District of California, Second Division, be directed to enter such decree as is meet in the premises; or that the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit shall reverse said decree and render a proper decree on the record, and a judgment for their costs and disbursements herein together with their costs and disbursements in said lower Court.

JESSE OLNEY,

Counsel and Solicitor for the Complainants.

[Endorsed]: Filed Aug. 24, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [155]

In the United States District Court in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Complainants,

vs.

DAVID ISAACS,

Defendant.

Order Allowing Appeal and Fixing Amount of Bond.

This day came Jesse Olney, solicitor of record for the above-named complainants, and presented their petition for an appeal and assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court hereby allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of $500.00, with good and sufficient surety, and it is hereby ordered that a certified transcript of the record, proceedings and

papers in the cause be certified to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 24th day of August, 1917.

WM. C. VAN FLEET,

Judge of the United States District Court for the Southern Division of the Northern District of California.

[Endorsed]: Filed Aug. 24, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[156]**

31042–17.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

Capital Paid in Cash, $2,000,000.

Total Resources Over $6,000,000.

HOME OFFICE:

BALTIMORE, MD.

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA.,

SECURITY INSURANCE COMPANY OF NEW HAVEN,

Complainants,

vs.

DAVID ISAACS,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: The undersigned United States Fidelity & Guaranty Company hereby acknowledges itself to be held and firmly bound unto David Isaacs in the full and just sum of Five Hundred Dollars, lawful money of the United States:

The condition of the foregoing obligation is such that

WHEREAS the above-named American Central Insurance Company, National Fire Insurance Company of Hartford, Insurance Company of North America, National Union Fire Insurance Company of Pittsburg, Pa., Security Insurance Company of New Haven, complainants, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree in the above-entitled cause, made and entered by the District Court of the United States for the Southern Division of the Northern District of California, Second Division;

NOW, THEREFORE, the condition of this obligation is such that if the above-named, American Central Insurance Company, National Fire Insurance Company of Hartford, Insurance Company of [157] North America, National Union Fire Insur-

ance Company of Pittsburg, Pa., Security Insurance Company of New Haven, Complainants, shall prosecute their appeal to effect and answer all costs, if they shall fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

Dated at San Francisco, this 24th day of August, A. D. 1917.

UNITED STATES FIDELITY & GUARANTY COMPANY.

By WILL LOZE,

By W. S. ALEXANDER,

Attorneys in Fact.

[Corporate Seal]

[Endorsed]: Filed Aug. 24, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[158]**

(Title of Court and Cause.)

Affidavit for Order for Transmission of Original Exhibits to Circuit Court of Appeals.

United States of America,
State of California,
City and County of San Francisco,—ss.

Jesse Olney, being duly sworn, says: That he is and at times herein has been the solicitor for the complainants in this cause; and that there is by them an appeal pending herein to the U. S. Circuit Court of Appeals for the Ninth Circuit. That praecipes have been duly filed with the clerk of this Court as to documents, papers, etc., to be included in the transcript on said appeal; but that there are certain

original documents and papers which by reason of form and general character cannot be presented in the transcript and whereof actual inspection by the Circuit Court of Appeals in detail is a matter of vital necessity to the appellants in this cause for the proper understanding and consideration of their said appeal by said Appellate Court. That these documents consist of original books of account; original issues of newspapers some 10,000 loose leaf sales slips, etc., and are designated in said cause as Defendant's Exhibits "D" and "C"; and Complainants' Exhibits 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, and "C" and 16.

The complainants therefore ask that the proper order for transmission of the same to the U. S. Circuit Court of Appeals for the Ninth Circuit be made.

JESSE OLNEY.

Subscribed and sworn to before me this 8th day of October, 1917.

[Seal] J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [159]

(Title of Court and Cause.)

Order for Transmission of Original Exhibits to Circuit Court of Appeals.

GOOD CAUSE APPEARING THEREFOR by the affidavit dated and filed this day of Jesse Olney, Esqrs., solicitor for the complainant-appellants on the appeal pending herein to the Circuit Court of

Appeals of the United States for the Ninth Circuit, that actual inspection of certain original exhibits in this cause be had by said Court and which said actual inspection of said originals by reason of their form and general character is of vital necessity to the appellants in this cause and for the proper understanding and consideration of their appeal by the Circuit Court of Appeals, the same to be received and considered by it in connection with the transcript of the proceedings:

IT IS ORDERED: That the clerk of this Court do transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the originals of exhibits in this cause, making such arrangements as shall be necessary for their safety and return, as follows: Defendants' Exhibits "D," "C"; Complainants' Exhibits 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, "C," and 16.

Dated October 8th, 1917.

WM. C. VAN FLEET,
Presiding Judge.

[Endorsed]: Filed Oct. 8, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [160]

(Title of Court and Cause.)

Order Enlarging Time to File Record and Docket Cause in Appellate Court Thirty Days from November 19, 1917.

GOOD CAUSE APPEARING, it is hereby ordered that the Complainants' time for filing and

docketing the record in the above-entitled cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same hereby is extended THIRTY DAYS from the 19th day of November, 1917.

Dated November 14th, 1917.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed Nov. 16, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [161]

Plaintiff's Exhibit "A"—Letter, November 26, 1913, Isaacs to Main.

Letter dated November 26, 1913, from D. Isaacs to George C. Main, as follows:

Dear Sir:

I enclose herewith statement of A. Bridge Company salvage, together with check for $1049.81 to cover the net proceeds.

Trusting you will find same correct and satisfactory, I am.

Yours very respectfully,
COAST FIRE & MARINE SALVAGE CO.,
By D. ISAACS. [162]

Plaintiff's Exhibit "B"—Statement of Account with Seattle National Bank.

In Account With

THE SEATTLE NATIONAL BANK

Seattle, Washington.

Customers will confer a favor by reporting any difference promptly.

1913.	Checks.	1913.	Deposits.
Sept. 5	160.00	Sept. 5	1,000.00
12	12.45	6	636.99
15	5,000.00	8	2,310.00
16	200.00	8	629.38
18	3,000.00	8	898.90
19	283.90	9	255.96
20	4,000.00	9	924.30
23	25.64	10	1,503.10
24	4.75	10	373.00
24	10.00	11	406.42
25	2,000.00	12	710.93
27	2,000.00	12	263.15
30	142.80	13	280.00
30	2.50	15	2,263.23
30	250.00	16	374.00
30	50.00	16	1,016.42
		18	622.05
30	Bal. 3,602.22	19	377.35
		19	291.54
		22	377.75
		22	1,756.93
		23	918.10

	24	478.78
	25	326.00
	26	522.19
	27	422.17
	29	805.62
20,744.26		20,744.26

[163]

Plaintiff's Exhibit 2—Letter to Mr. D. Isaacs.

Mr. D. Isaacs,
103 First Ave., South,
Seattle, Washington.

Dear Sir:

I hereby submit to you the following bid of the A. Bridge stock: Forty-seven cents ($.47) on the dollar of the invoice price.

Hoping this meets with your approval, I remain,
Yours truly,

[Endorsed]: No. 253. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 2. Filed Jan. 30, 1917. W. B. Maling, Clerk. [164]

Plaintiff's Exhibit 3—Advertisement, September 28, 1913, in Seattle "Sunday Times."

THE SEATTLE "SUNDAY TIMES," Sept. 28, 1913.

The balance of the A. Bridge & Co., stock, 103–05 First Ave. South, will be offered for bids Monday, September 29th, at 3 P. M.

COAST FIRE & MARINE INSURANCE CO.,
D. ISAACS,
Manager.

[Endorsed]: Plffs. Exhibit 3. Filed Jan. 30, 1917. W. B. Maling, Clerk. [165]

Plaintiff's Exhibit 9—Inventory of H. C. Seynei & Co., November 17, 1913.

INVENTORY OF
H. C. SEYNEI & COMPANY
Nov. 17, 1913.

Merchandise in Dept. #1				$11,844.27
" " " #2				1,409.95
" " " #3				1,044.40
" " " #4				1,085.73
" " " #5				652.61
" " " #6				782.96
" " " #7				233.56
" " " #8				674.38
Total				$17,727.86
Merchandise sold.				
The Hub. Amt. $373.84½			Disc. $74.31	299.53
" "				14.00
United States Rubber Co.				40.25
Norman Hotel				28.30
Black Mfg. Co.	107.40		26.85	80.55
Pearce Bros.	522.44		17.93	504.51
J. Aronson				79.90
Pearce Bros. Credit Memo. Bill				47.25
				$1,094.29
Total				$16,633.57

[Endorsed]: No. 253. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 9. Filed Jan. 30, 1917. W. B. Maling, Clerk. [166]

Plaintiffs' Exhibit 10—Advertisement, October 17, 1913, in Seattle "Daily Times."

THE SEATTLE "DAILY TIMES," FRIDAY EVENING, OCT. 17, 1913.

AGAIN I CUT.

The low price at which I purchased from the fire insurance companies the big stock formerly owned by A. Bridge & Co. gave me a chance to offer most unusual bargains to the public. And the public certainly responded. I'm going to keep the crowds coming by slashing the prices still further.

* * * * * * * * *

HARRY SEYNEI.

[Endorsed]: Plffs. Exhibit 10. Filed Jan. 30, 1917. W. B. Maling, Clerk. [167]

Plaintiff's Exhibit 12—Advertisement, October 31, 1913, in the Seattle "Daily Times."

THE SEATTLE "DAILY TIMES," FRIDAY EVENING, OCT. 31, 1913.

I HAVEN'T HAD AN AD IN THE PAPERS FOR TWO WEEKS.

Yet I've kept a force of clerks busy waiting on old customers, or people who were sent in by old customers. Treat the public right, give the utmost limit of value for every dollar received, back every sale with a MONEY-BACK-IF-YOU'RE-NOT-SATISFIED GUARANTEE, and the man or woman who comes to your store for a SPECIAL BARGAIN

becomes a regular customer. That's why I'm winning out.

* * * * * * * * *

HARRY SEYNEI.

[Endorsed]: Plffs. Exhibit 12. Filed Jan. 30, 1917. W. B. Maling, Clerk. [168]

Plaintiff's Exhibit 13—Advertisement, October 3, 1913, in the Seattle "Daily Times."

THE SEATTLE "DAILY TIMES," FRIDAY EVENING, OCT. 3, 1913.

I'M STARTING TO BUILD A BUSINESS.

And I'm lucky in the start. I've just bought from the Fire Insurance Cos. the big stock formerly owned by A. Bridge & Co. I got it at a ridiculously low price and I'm going to sell it to the public at prices just as ridiculously low. I'm going to clean every bit of it out in a hurry to make room for a fine big stock. When the big sale opens Saturday at 10 A. M. you'll see good clothing, Men's Furnishings and Shoes as nearly given away as this town has ever witnessed.

THESE PRICES WILL ADVERTISE MY BUSINESS.

* * * * * * * * *

HARRY SEYNEI.

[Endorsed]: Plffs. Exhibit 13. Filed Jan. 30, 1917. W. B. Maling, Clerk. [169]

Plaintiff's Exhibit 14—Advertisement, October 2, 1913, in the Seattle "Daily Times."

THE SEATTLE "DAILY TIMES," THURSDAY EVENING, OCT. 2, 1913.

OLD FIRM PASSES INTO HANDS OF YOUNG BUSINESS MAN.

Fire Insurance Companies, Which Took Over the A. Bridge & Co., Stock, Sell to Harry Seynei—Big Popular-Priced Clothing Store will be Established.

Harry Seynei, one of the best known business men of the younger generation in Seattle, started plans last Tuesday which, if consummated, will place him at the head of one of the largest popular priced clothing stores on the Coast. By purchasing from the fire insurance companies the stock of A. Bridge & Co., 103–07 First Avenue South, he secured a big start for the exceptionally low price at which the stock was bought enables him to start his new store by offering great values to the public. The entire stock will be put on sale Saturday morning at 10 o'clock at prices that should start a stampede toward the corner of First and Yesler Way.

It is Mr. Seynei's ambition to make a steady customer of every purchaser at the first sale. To this end great cuts in prices have been made, full particulars of which will appear in to-morrow's papers.—ADV.

[Endorsed]: Plffs. Exhibit 14. Filed Jan. 30, 1917. W. B. Maling, Clerk. [170]

Plaintiff's Exhibit 15—Advertisement, October 10, 1913, in the Seattle "Daily Times."

THE SEATTLE "DAILY TIMES," FRIDAY, EVENING, OCT. 10, 1913.

HOW CAN I DO IT?

Many of my friends are wondering how I can sell a $22.50 Suit for $9.90. Well, you know, I got this stock way below cost. Bought from the fire insurance companies the great stock formerly owned by A. Bridge & Co. at a remarkably low price. I'm sacrificing it simply to advertise the place and get you into the habit of coming in.

HARRY SEYNEI.

[Endorsed]: Plffs. Exhibit 15. Filed Jan. 30, 1917. W. B. Maling, Clerk. [171]

Plaintiff's Exhibit 16.

HOTEL HERALD

TERRY AVE. & MARION ST.

Seattle.

Cashier. Bookkeeper
Ticket
Preston
Electric Lights
Schlackers
Clothes Dep.....1
Shoes.....2
Hats—Suit Cs.....3
Shirts 4
Underwear.....5
Alaska Outfit.....6
Overalls 7
Furnishing goods...8

Furnishing 1 Cs. Flan Linen S. D.
1 " Heavy Cotton Reb.
1 " Cashmere
1 " Cotton
1 " Heavy wool—Med.
Suspenders—2 grades
Hkfs.
Work Shirt—fill in on Flannel—Dress Shirt
Neckwear
Overalls—Jumpers
Work Gloves
Union Suits
Blankets
Hats
Umbrellas.

[Endorsed]: No. 253. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 16. Filed Jan 30, 1917. W. B. Maling, Clerk. [172]

HOTEL HERALD.
TERRY AVE. & MARION ST.
Seattle.

735 pr. Shoes	2166.80
123 " Rubber Boots—Shoes	289.65
Oilskins—Pants—Coats—Hats	110.95
Dust Coats—Overalls—Robes	
Mackinaw—Khaki	944.87
Underwear—Sweaters	
Dress Shirt—Gloves	3662.98
Hats—Caps—Hat Bands	1322.03
Vests—Aprons	50.50

Trunk—Suit Cases	58.50
Collars—Cuffs	253.55
1108 Suits....8.50	11893.00
	850
157 Overcoats	1302.50
52 Cravenetts	374.00
4 Fur Coats	89.00
761 Pr. Pants	2043.90
	24,603.39

[Endorsed]: No. 253. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 16. Filed Jan. 30, 1917. W. B Maling, Clerk.

Plaintiff's Exhibit 18—Inventory A. Bridge & Co. Seattle.

A BRIDGE & COMPANY—SEATTLE.

(D. ISAACS MATTER.)

INVENTORIES AT VARIOUS DATES COMPARED.

	Total.	Clothing, Suits and Overcoats.	Per Cent.
No. 1 August, 1913 (18th)	45 954 00	24 135 40	52.52%
2 September, 1913 (28th)	24 653 35	15 772 90	63.98%
3 November 29, 1913	16 633 57	11 844 27	71.21%
	Total.	Shoes.	Per Cent.
No. 1 August, 1913 (18th)	45 954 00	5 176 40	11.27%
2 September, 1913 (28th)	24 653 35	2 166 80	8.79%
3 November 29, 1913	16 633 57	1 409 95	8.48%

Sales between No. 1 and No. 2—Total.	21 300 65	
Sales between No. 1 and No. 2—Suits and Overcoats	8 362 50	
Per Cent of Suits and Overcoats Sold to Total Sold		39.26%
Sales between No. 1 and No. 2—Total.	21 300 65	
Sales between No. 1 and No. 2—Shoes	3 009 60	
Per Cent of Shoes Sold to Total Sold.		14.13%

[173]

SUMMARY OF TRANSACTIONS FROM THE BOOKS OF H. C. SEYNEI & COMPANY IN THE HANDLING OF STOCK OF BRIDGE & COMPANY.

These are the sales and purchases between Inventory No. 2 and Inventory No. 3.

	Bridge Stock Inventory.	Purchases.	Returns.	Sales.
Department 1—Clothing	15 794 90	1 056 55	21 90	5 118 83
Department 2—Shoes	2 183 30	613 63		1 690 42
Department 3—Hats	1 310 24	298 20		562 61
Department 4—Sweaters and Shirts	1 311 11	773 93	4 15	2 080 33
Department 5—Underwear	2 012 50	1 059 98	5 00	2 012 06
Department 6—Alaska Outfits .	1 105 55	951 98	188 50	1 364 44
Department 7—Overalls	224 67	449 92		532 74
Department 8—Furnishings ...	710 99	1 279 14		1 698 17
	24 653 35	6 483 33	219 55	15 059 60
Cash book entries (p. 23) not segregated				1 008 34
				16 067 94

EXPENSES: Advertising	58 90		
Advertising	517 61	576 51	
Salaries and Labor		1 264 60	
Rent		920 00	
Insurance		205 00	
Office Expense....		16 25	
Sundry Expense..		150 64	
		3 133 00	

Inventory No. 2 was taken in September, 1913, and Inventory No. 3 was taken in November, 1913.

The foregoing is a summary of the transactions compiled from the books of H. C. Seynei & Company.

[174]

A. BRIDGE AND COMPANY MERCHANDISE STOCK (ISAACS MATTER)

MEMORANDUM OF RESULTS OF SALES AND PURCHASES BETWEEN THE INVENTORIES No. 2 AND No. 3. (BOOKS OF H. C. SEYNEI AND COMPANY)

TOTAL SALES OF MERCHANDISE:		
Sales subsequent to No. 2..		16 067 94
Inventory No. 2	24 653 35	
Purchases Added	6 263 78	
	30 917 13	
Inventory No. 3.....	16 633 57	
Balance — Cost of Goods Sold		14 283 56
Profit		1 784 38
CLOTHING:		
Sales Subsequent to No. 2..		5 118 83
Inventory No. 2.....	15 794 90	
Purchases Added	1 034 65	
	16 829 55	
Inventory No. 3.....	11 844 27	
Balance — Cost of Clothing Sold		4 985 28
Profit		133 55

SHOES:		
Sales Subsequent to No. 2..		1 690 42
Inventory No. 2	2 166 80	
Purchases Added	613 63	
	2 780 43	
Inventory No. 3	1 409 95	
Balance — Cost of Shoes Sold		1 370 48
Profit		319 94
Profit as above on all departments		1 784 38
Profit on Clothing Sales ...	133 55	
Profit on Shoe Sales	319 94	
		453 49
Profits on all other departments		1 330 89

[Endorsed]: Plff. Exhibit 18. Filed Jan. 31, 1917. W. B. Maling, Clerk. [175]

Plaintiff's Exhibit No. 19—Comparison of Inventory No. 1 and Inventory No. 2 Showing the Classes and Process of Goods in Which the Second Inventory Exceeded the First.

A BRIDGE & COMPANY

SEATTLE

Comparison of Inventory No. 1 and Inventory No. 2 Showing the Classes and Prices of Goods in Which the Second Inventory Exceeded the First.

Class	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total
Men's Suits	6 50	4	9	5	
	6 75	–	1	1	
	9 50	191	195	4	
	10 50	38	96	58	
	13 50	41	85	44	
	14 50	21	46	25	
	15 50	–	1	1	
	16 50	1	15	14	
	17 00	4	6	2	
	20 00	4	5	1	155
Men's Pants	1 00	16	45	29	
	2 50	152	354	202	
	3 25	37	71	34	
	3 65	–	35	35	300
Shoes	75	–	2	2	
	2 25	19	34	15	
	2 50	21	87	66	
	2 60	15	28	13	
	3 40	21	34	13	
	4 10	2	5	3	
	5 00	20	43	23	
	5 25	–	3	3	
	5 55		4	4	142
Hats and Caps	175		90	90	
	50		48	48	
	75		34	34	

Class	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total
Hats and Caps	1 00	2	3	1	
	1 05	8	39	31	
	1 25	42	65	23	
	1 40		22	22	
	1 85	25	36	11	
	3 50	3	15	12	
(Hats) Doz.	2 00		147	147	
" "	3 50		36	36	
" "	6 00		8	8	
" "	7 50		28	28	
" "	9 00		48	48	530
Overcoats and Cravenettes	4 75	3	15	12	
	5 25	–	2	2	
	5 75	–	17	17	
	6 50	26	44	18	
	9 00	40	41	1	
	9 50	2	21	19	
	10 00	3	4	1	
	10 50	8	23	15	
	13 00	5	7	2	
	15 75		2	2	89
Boys' Suits	None in Excess in Inv. #2				
Rubbers, Boots, Sandals, etc.	55	9	11	2	
	2 20	10	12	2	
	2 25	3	43	40	

	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total
Rubbers, Boots,					
Sandals, etc.	2 75			6	
	2 95		9	9	
	3 85		1	1	
	4 35		3	3	
	4 85		11	11	
	5 00		7	7	
	5 50		2	2	
	8 85		1	1	84
Mackinaws	3 25	1	21	10	
	4 10	16	20	4	24
Oil Coats	1 15	–	4	4	
	1 80	–	2	2	
	2 00	–	3	3	
	2 80	–	3	3	
	3 00	–	1	1	
	4 00	1	2	1	14
Sweaters	1 95		41	41	
	2 00	3	15	12	
	2 35	8	49	41	
	3 60	2	49	47	
	3 60	2	3	1	
	4 00	1	2	1	
	4 05	3	5	1	
	4 10	5	22	17	
	4 35	1	3	2	164

[Endorsed]: No. 253. U. S. Dist. Court. Nor. Dist. Calif. Plff.-Deft. Exhibit 19. Filed Jan. 31, 1917. W. B. Maling, Clerk. [176]

Defendant's Exhibit No. 1—Recapitulation.

RECAPITULATION.

Clothing table...	#1—	$930.75	
	2—	1879.25	
	3—	1538.00	
	4—	1482.00	
	5—	1293.25	
Total table 1 to 5, inclusive.....			7123.25
Clothing table...	#6—	918.90	
	7—	1084.25	
	8—	324.75	
	9—	1185.00	
	10—	1114.45	
	11—	356.00	
	12—	378.95	
Total table 6 to 12, inclusive.....			5362.30
Clothing table...	#13—	238.75	
	14—	317.00	
	15—	108.75	
	16—	967.50	
	17—	1073.50	
	18—	1281.50	
	19—	1069.00	
	20—	1473.00	
	21—	754.00	
Total 13 to 21, inclusive.....			7283.00

Suits, Overcoats & Uniforms on Counter & in Cabinet.....		1196.70
33 pr. Pants total loss.....	3.75	123.75
Overcoats & Suits on Balcony.....		2773.55
Shoes.....		4785.73
Rubber Shoes & Boots.....		567.30
Mds. in Annex other than Shoes & Rubber Goods.....		3621.40
Lot Shirts, Union Suits, Sweaters, etc. Total Loss.....		364.65
Wool shirts in shelves.....		1332.25
[177]		
Underwear near stair & table.....		730.36
Sweaters " " "		
Furnishings in shelves.....		4829.90
Underwear & cases under counter..		76.92
18 5/12 doz. Shirts in show case....	11.50	211.79
12 4/12 " " " " " ...	9.	111.00
Neckwear & Sox in case.....		114.00
Shirts & Sox in case.....		14.32
White Goods in Drawers, Barbers' & Waiters' Coats, vests etc.....		491.40
Hats & Caps.....		2144.48
Sweaters on Ledge n. side.....		465.40
Trunks & Suit Cases.....		110.10
Sweaters, Rugs and Underwear, balcony.....		1343.62
Goods in windows.....		777.23
[178]		

Defendant's Exhibit "2N"—Excerpt from Letter Dated September 8, 1913, Main to Company.

A few days following the fire, after numerous conferences, Bridge made an assignment to P. B. Truax of the Seattle National Bank as Trustee for the creditors. Mr. J. R. Mason represented the assured and Mr. Truax in the adjustment of the loss, and put in a claim for loss amounting to $18,254.84. My own figures amounted to $13,588.65, which was the maximum amount that I was willing to pay for the damage and allow the assured to keep the stock. We went over the items and stock numerous times for several days and were unable to agree. I did not want to submit the matter to appraisers, fearing the result would be disastrous to us, and finding that I could not agree with Mr. Mason I took the other tack of getting the sound value down as low as possible, with the idea of eventually taking the stock. I therefore sent for Mr. Isaacs, who was in Portland at the time, and he came up here and spent several days and went over the stock with me. Meanwhile Mr. Mason reduced his claim to $17,000, and this as a final proposition to $16,200, which I would not accept, and he also claimed a sound value of $38,675, which figure was also not accepted. As a consequence of Mr. Isaac's visit and his examination of the stock he concluded that he would be willing to advance as a guarantee the sum of $18,100, bringing the loss down to the figures claimed by Mr. Mason, provided we could get the sound value down to $34,300. After considerable more negotiation this was

agreed to by Mr. Mason, representing the assured, and the sound value was finally fixed at $34,300 and the loss at $16,200 in compromise, based on the guarantee of $18,100 advanced by Mr. Isaacs and which has been turned over to the Trustee for the creditors. This was the best that could be done under the circumstances and the loss has been closed at the lowest figure acceptable [179] to the assured and the chance remains that we may secure considerable further returns from the sale of the stock over and beyond the guarantee advanced by Mr. Isaacs.

* * * * * * * * *

I have spent a good deal of time on this adjustment, which accounts for the size of my bill, and believe it has been worth while. The stock has practically been in my charge for a number of days and all the details in connection with the care of same have been looked after by me until the arrival of Mr. Isaacs on Friday last.

* * * * * * * * *

Receipted voucher in duplicate is enclosed covering my services and expense and trust all will be found satisfactory.

* * * * * * * * *

[180]

Defendant's Exhibit "2Q"— Statement—Salvage of A. Bridge & Co.

COAST FIRE & MARINE SALVAGE CO.
D. Isaacs, Mgr.
1261 Market Street,
San Francisco.

STATEMENT—SALVAGE OF A. BRIDGE & CO.
Clothing, Furnishings, Shoes.

Net Sales—		28901.92
Expense:		
Rent	920.00	
Light	66.88	
Advertising	1204.21	
Clerk Hire	1655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling at 20% on $28901.92	5780.38	
Advanced as guarantee	18100.00	
	27852.11	27852.11
Net Proceeds		1049.81

[181]

Defendant's Exhibit "2T"—Letter, December 18, 1913, Main to Company.

GEORGE C. MAIN,
Adjuster of Fire Losses,
925 Leary Building,

Main 7835. Seattle. Dec. 18, 1913.

To Companies Interested.

Gentlemen:—

LOSS SEATTLE A. BRIDGE & CO.—FIRE AUG. 11, 1913.

I beg to enclose herewith copy of report on sale of salvage rendered by the Coast Fire & Marine Salvage Co. of San Francisco, from which will be seen that the total net recovery is $1049.81.

You will also find enclosed check covering your proportion, the total insurance on stock being $21,000.

I am pleased that we are able to report a substantial salvage, although not quite as much as I had hoped for, but this is easily explained owing to the adverse conditions which confronted Mr. Isaacs in disposing of the stock. However, the amount recovered is net gain over what we were able to close the loss with the assured through their adjuster, Mr. Mason, and on the whole satisfactory.

Kindly acknowledge receipt in due course, and oblige

Yours very truly,
GEO. C. MAIN,
Adjuster [182]

GCM/M

Defendant's Exhibit "B"—Statement January 30, 1917, Lester Herrick and Herrick to Schlesinger.

#2196–88

LESTER HERRICK AND HERRICK,
Certified Public Accountants,
Merchants Exchange Building.
San Francisco, Cal., January 30, 1917.

Bert Schlesinger, Esq.,
San Francisco, California.

Dear Sir:

At your request we have made an investigation of the transaction appearing as having been carried on by Mr. D. Isaacs in connection with the salvage of Messrs. A. Bridge & Co. at Seattle, Washington, during the month of September, 1913, growing out of the arrangements apparently made between Mr. D. Isaacs and the various insurance companies which were concerned in the matter by reason of a fire loss.

In this connection we have received for purpose of this examination the following stated books and records:

A cloth covered book apparently used for the purpose of a record of this particular business, which is marked by us with the letter "A" in the upper corner of the front cover for purpose of identification.

Vouchers supporting certain disbursements numbered by us from one to ten inclusive.

Four typewritten sheets designated "Labor Account Bridge Sale," and numbered by us from one to four inclusive.

Statement of the account between Mr. D. Isaacs and the Seattle National Bank extending from September 5th to November 24, 1913, showing total deposits and withdrawals of $36,908.95.

Twenty-seven deposit tags of the Seattle National Bank purporting to be copies of the original deposit tags covering the bank deposits by Mr. D. Isaacs as to the period from September 5th to September 29, 1913.

Four bank checks drawn by Mr. D. Isaacs upon The First National Bank of North Yakima, Washington, apparently embraced within the deposits made by Mr. D. Isaacs in the Seattle National Bank.

Typewritten statement purporting to be the account of Mr. D. Isaacs of the sales in this matter, aggregating a total of $28,901.92. [183]

Check of Mr. D. Isaacs upon the Wells, Fargo Nevada National Bank in favor of Geo. C. Main, Adj. in the sum of $1,049.81.

Copy of first Amended Complaint in the case of American Central Insurance Co. et als., Plaintiffs, vs. David Isaacs, Defendant, showing on Page 4 the statement of this transaction as rendered by Mr. D. Isaacs.

Sales tags presented as all of the sales tags covering retail sales in this matter during the period from September 6, 1913, to September 27, 1913.

The principal purpose of this investigation has been the acquirement of information and a determination from the evidence presented concerning

the accuracy and integrity of the sales and expenses as reported by Mr. D. Isaacs and upon which report the settlement was made between Mr. D. Isaacs and the insurance companies concerned.

Upon the conclusion of this investigation we now present the following statements:

STATEMENT A—Statement of Receipts and Disbursements as per Memo. Cash-Book.

STATEMENT B—Recapitulation of Sales, Separately Stated as Appear by the Cash Memorandum Record and as Determined by us upon the Basis of the Sales Tags Presented for Examination.

STATEMENT C—Statement of Total Transaction Based upon Information Received.

STATEMENT D—Re Deposits in the Seattle National Bank.

STATEMENT E—Re Evidenced Net Receipts Available for Deposit.

We will now proceed with a consideration of these statements:

STATEMENT A:

This statement exhibits total net sales of $17,807.92, direct disbursement of expense of $3,973.60 with resultant net receipts of $13,834.32.

As to the cash sales of $17,779.60 reference is directed to the showing by Statement B. This total of $17,807.92 is correctly set forth upon Page 68 of

the Memorandum Cash Book upon the basis of the accuracy and integrity of the entries of daily sales there [184] showing. All of the disbursements appear by the record of disbursements showing on Pages 68 and 72 of the said book. As to the disbursements supported by vouchers, the vouchers presented appear to represent actual and proper payments. As to the disbursement for labor, this total disbursement of $1,654.71 is in agreement with the cash disbursement record aforesaid and as per the typewritten sheets purporting to exhibit the various employee's time of service and individual payments. These payments are stated to have been made in coin coming from the coin received from the sales and no vouchers are presented. As to the petty expenses aggregating $93.19, this is the correct total of a large number of petty purchases and expenses appearing in the aforesaid record and apparently of a natural and proper character.

STATEMENT B:

This statement exhibits a comparison between the daily totals of sales appearing by the record of the aforesaid book and as produced by us from a machine recapitulation of the tags presented and purporting to be all of the tags of the actual sales. A comparison of the totals evidenced an overage in the record total entering into the statement of settlement over the said total as obtained by us from the examination of the original tags of $8.01. In this connection it must be understood that some of these tags are poorly written or with a poor carbon impression and there can be no actual certainty as to

the actual exact total thereof. In our opinion and upon the assumption that all tags have been presented to us, we have reached the opinion that the record of these sales is at least intently and approximately correct.

STATEMENT C:

This statement presents in concrete form the settlement between Mr. D. Isaacs and the insurance companies upon the basis of the information afforded by the various papers and records which have been hereinbefore referred to. Upon the basis of the accuracy [185] of the statement of the net receipts from the retail sales, showing by Statement A, in the sum of $13,834.32, the bulk sale of the balance of stock amounting to $11,094.00, and the commission of Mr. D. Isaacs amounting to $5,780.38, there has been an apparent over-payment by Mr. D. Isaacs resulting from the stated payments of $18,100.00 and $1,049.81, amounting to $1.87. This $1.87 represents the excess of the total disbursements amounting to 3,973.60 appearing by Statement A, over the total of the segregated expenses showing by the statement exhibited in the aforesaid Amended Complaint in the total amount of $3,971.73.

STATEMENT D:

This statement exhibits the total deposits in the account of Mr. D. Isaacs in the Seattle National Bank during the period from September 6th to September 29, 1913, in the total sum of $19,744.26, from which we have deducted the sum of $2,850.00 aggregating the total of four checks upon the First National Bank of North Yakima, Wash., and referred

to hereinbefore, with a resultant balance in the sum of $16,894.26, which amount of deposit is evidently concerned with the deposits made by Mr. D. Isaacs from the realizations from the sale concerned in this matter.

STATEMENT E:

This statement is partially based upon information affored to us by Mr. D. Isaacs as to those expenses which were paid by bank check inasmuch as the checks themselves have not been presented to us. The statement exhibits the net receipts from sales as per statement of $17,759.42. Of the total expenses appearing by Statement A in the sum of $3,973.60, we are informed by Mr. Isaacs, and the information appears reasonable, that certain expenses, aggregating $2,192.90, were made by means of bank checks. With this consideration there results a payment in cash in the total sum of $1,780.70 out of the receipts mainly in payment of the labor charge, leaving a balance of evidenced net receipts in the sum of $15,978.72 which naturally in the course of the transaction would [186] have been deposited in the account with the Seattle National Bank that was established in connection with this transaction. Statement D exhibits a net deposit during the time from this or some other unknown source of $16,894.26, which exceeds the amount of the net receipts available for deposit showing by this Statement in the sum of $15,978.72 in the sum of $915.54. In Statement D we include a deposit on September 29th of $805.62. The deposit on September 27th was $422.17, while the sales of Sep-

tember 27th, or the last day, amounted to $1,055.50. It evidently was not the practice to wholly deposit the daily receipts as received and we do not know the real composition of this deposit of $805.62, but it is manifest that at least a part thereof covered the funds remaining on hand after the conclusion of the sale on September 27th. We are informed by Mr. Isaacs that he considered this account to be entirely under his own personal control and that the insurance companies concerned were only concerned with a correct accounting and settlement and not with the maintainence of this particular bank account. As appears by the statement of the Seattle National Bank there was a deposit in this account of $1,000.00 with which the account was opened on September 5th and Mr. Isaacs informs us that this deposit was to provide for expenses prior to the receipt of funds from the sale. Mr. Isaacs informs us that without specific recollection it is probable that deposits were made by him within these stated total deposits in the period of moneys received by him from other sources. The information afforded by this Statement E is not definite or conclusive but it is indicated that the total excess of the deposits over the funds available for deposit from the sale in the sum of $915.54 is subject to a reasonable explanation and in any event is not of a relatively large amount.

We are, Dear Sir,

Faithfully yours,

LESTER, HERRICK & HERRICK,

Certified Public Accountants. [187]

STATEMENT A.

STATEMENT OF RECEIPTS AND DISBURSEMENTS AS PER MEMO. CASH BOOK.

RECEIPTS:				$17,807.92
Cash Sales,				
D. Isaacs, Personal	As per Statement B....		17,779.60	
	" " C. B. Fol. 68....		48.50	
Less Refunds	" " " " " "		17,828.10 20.18	
DISBURSEMENTS:				3,973.60
Supported by Vouchers	" " " " " "& 72		2,225.70	
The Gatzert Schwabacher Land Co.	Rent Vch. #1	920.00		
Times Printing Co.	Advt. 2	507.15*		
The Post-Intelligencer Co.	" 3	308.05		
The Star Publishing Co.	" 4	208.03		
J. C. Corey Sign Co.	" 5	80.00		
Sun Publishing Co.	" 6	71.00		
Puget Sound Traction L. & P. Co.	Lights 7	66.88**		
Swedish Press	Advt. 8	30.00		
Cotton Burckhardt Company	Ins. 9	28.09		
Milwaukee Mechanics Ins. Co.	" 10	6.50***		
Labor as per Memo. Pay Rolls			1,654.71	
10 Items "J" Folio 68		707.26		
10 " " " 72		947.45		
Petty Expenses			93.19	
20 Items "M" Folio 68		31.45		
10 " " " 72		61.74		
NET RECEIPTS				$13,834.32

* Voucher Shows $512.35.
** Not Receipted.
*** Voucher Shows $ 27.50.

STATEMENT B.
RECAPITULATION OF SALES.

			As per Cash Memo. C. B. Fol. 68.	As per Sales Tags.
September	6,	1913,	$3,717.25	3,707.95
"	8,	"	1,612.77	1,591.22
"	9,	"	929.40	946.11
"	10,	"	820.65	819.73
"	11,	"	725.80	736.27
"	12,	"	563.02	570.27
"	13,	"	1,636.09	1,626.36
"	15,	"	637.60	642.94
"	16,	"	556.65	601.11
"	17,	"	445.25	427.13
"	18,	"	369.00	363.90
"	19,	"	404.35	430.88
"	20,	"	1,619.95	1,591.26
"	22,	"	776.10	746.82
"	23,	"	510.60	536.83
"	24,	"	392.46	389.84
"	25,	"	496.36	507.20
"	26,	"	510.80	497.59
"	27,	"	1,055.50	1,038.18
		Total	$17,779.60	17,771.59

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STATEMENT C.

STATEMENT OF TOTAL TRANSACTION BASED UPON INFORMATION RECEIVED.

Net Receipts, Sept. 6–27, as per Statement A.....		$13,834.32
Balance of Stock, Sold to H. C. Seynei & Co. Sept. 30, as per Memo. Received...		11,094.00
Total Net Proceeds.....		24,928.32
Less Commission to D. Isaacs, as per Memo. Received		5,780.38
Sales, Sept. 6–27.....17,807.92		
H. C. Seynei & Co.....11,094.00		
20% of	28,901.92	
Net Proceeds.....		19,147.94
D. Isaacs Advance, as per Memo. Received..18,100.00		
D. Isaacs Settlement, Nov. 26, 1913, as per Memo. Received.....	1,049.81	19,149.81
Apparent Overpayment.....		$1.87

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STATEMENT D.
RE DEPOSITS IN THE SEATTLE NATIONAL BANK.

September	6,	1913,	$ 636.99
"	8,	"	3,838.28
"	9,	"	1,180.26
"	10,	"	1,876.10
"	11,	"	406.42
"	12,	"	974.08
"	13,	"	280.00
"	15,	"	2,263.23
"	16,	"	1,390.42
"	18,	"	622.05
"	19,	"	668.89
"	22,	"	2,134.68
"	23,	"	918.10
"	24,	"	478.78
"	25,	"	326.00
"	26,	"	522.19
"	27,	"	422.17
"	29,	"	805.62
		Total	19,744.26

Less Checks on the National Bank of North Yakima, Wash., favor D. Isaacs, apparently included in the above dedeposits		2,850.00
Check #10, September 8, 1913.....	1,000.00	
Check #13, September 9, 1913.....	850.00	
Check #14, September 16, 1913.....	500.00	
Check #16, September 22, 1913	500.00	
Deposits from A. Bridge & Co. Sales, but possibly also including personal deposits of D. Isaacs.....		$16,894.26

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STATEMENT E.
RE EVIDENCED NET RECEIPTS AVAILABLE FOR DEPOSIT.

Cash Sales, As per Statement A.....		$17,759.42
Total Sales	17,779.60	
Less Refunds	20.18	
Less Expenses, Apparently paid out of Cash Drawer		1,780.70
Total Expenses, as per Statement A..	3,973.60	
Less Expenses stated as paid by Check	2,192.90	
Folio 68, Timbes Printing 12.45		
72, Advertising 283.90		
Telephone 4.75		
Cash Registers..... 10.00		
Advertising 308.05		
Times Publishing Co.....142.80		
Swedish Press 30.00		
Sun Pub. Ad. 11.00		
Post-Intellegencer Add. 12.45		
J. C. Cory Sign Co..... 80.00		
Star Pub. Co.....208.03		
Gas Elec. 66.88		
Rent 920.00		
Times Ad. 68.00		
Insurance 28.09		
Insurance 6.50		
Evidenced Net Receipts Available for Deposit		$15,978.72
Deposits from A. Bridge & Co., Sales, but possibly also including personal deposits of D. Isaacs, as per Statement A		$16,894.26
Evidenced Net Receipts Available for Deposit		15,978.72
Discrepancy.....		$915.54

This discrepancy can be accounted for either by personal deposits by D. Isaacs, or if any of the other expenses were paid by Check or if a Cash Check was drawn at any time and the money put in the *Chas.* Drawer and subsequently deposited.

[Endorsed]: Defts. Exhibit "B." Filed Jan. 31, 1917. W. B. Maling, Clerk. [192]

Praecipe for Transcript of Record.

(Title of Court and Cause.)

To Walter B. Maling, Esqr., Clerk of the Above-entitled Court:

You will please transmit the following certified transcript of the record, papers and proceedings in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

1. First Amended Bill of Complaint as amended by the amendment of January 31st, 1917, omitting portion of said amendment struck out by order of Court and consent of counsel:

2. Answer to First Amended Bill of Complaint;

3. Petition for Order allowing, and Bond on, Appeal; Decree;

4. Assignment of Errors; Citation on Appeal; Opinion;

5. Statement of Evidence;

6. Exhibits—as follows—in order named:

Complainants' Exhibits 2, 16, 19, 18, "D" (first page), 9, and following extracts from Complainants' Exhibit "2n," being excerpts from Report of Geo.

C. Main to Complainants dated September 8th, 1913: Last paragraph, page 1, commencing "A few days following fire" and ending on second page with words "advanced by Mr. Isaacs;" the third paragraph thereafter following on page 2, commencing "I have spent" and ending "Friday last." Last paragraph page 2 commencing "Receipted" and ending with "Satisfactory."

Defendant's Exhibits 1, "E–1," "B" (first four pages).

You will also transmit to said Court the originals of exhibits without incorporating such exhibits in the transcript, as follows;

Defendant's Exhibits "D," "C;"

Complainants' Exhibits 4, 5, 6, 7, C, 8, 1, 3, 10, 11, 12, 13, 14, 15, 17. [193]

The proper order of such transfer will be obtained.

Dated September 7, 1917.

JESSE OLNEY,
Solicitor for Complainants.

Copy received on Sept. 7, 1917.

BERT SCHLESINGER,
One of the Attys. for Deft.
LEON E. PRESCOTT,
One of the Attys for Deft.

[Endorsed]: Filed Sep. 7, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [194]

(Title of Court and Cause.)

Additional Praecipe for Transcript of Record.

To Walter B. Maling, Esq., Clerk of the Above-entitled Court:

You will please transmit the following additional record to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

Complainants' Exhibit 10—First nine lines followed by name Harry Seynei;

Complainants' Exhibit 3—Advertisement only.

Complainants' Exhibit 15—Insert only; followed by name Harry Seynei.

Complainants' Exhibit 12—First 13 lines followed by name Harry Seynei.

Complainants' Exhibit 14—Advertisement entire.

Complainants' Exhibit 13—First 8 lines followed by name Harry Seynei.

You will please designate each by the name of the newspaper and date of issue; and will please from each omit the picture.

JESSE OLNEY,
Solicitor for Complainants.

[Endorsed]: Filed Sep. 21, 1917. Walter B. Maling, Clerk. [195]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 253—IN EQUITY.

AMERICAN CENTRAL INSURANCE CO. et al.,
Plaintiffs,

vs.

DAVID ISAACS,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, to hereby certify the foregoing one hundred ninety-five (195) pages, numbered from 1 to 195, inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipes for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $91.10; that said amount was paid by Jesse Olney, Esq., attorney for plaintiffs; and that the original citation issued herein is hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court

this 2nd day of January, A. D. 1918.

[Seal] WALTER B. MALING,

Clerk United States District Court, for the Northern District of California. **[196]**

Citation on Appeal.

UNITED STATES OF AMERICA.—ss.

The President of the United States, to David Isaacs, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein American Central Insurance Co., National Fire Insurance Co. of Hartford, Insurance Company of North America, National Union Fire Insurance Co. of Pittsburg, Pa., Security Insurance Company of New Haven, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 27th day of August, A. D. 1917.

WM. C. VAN FLEET,

United States District Judge. **[197]**

[Endorsed]: No. 253—Equity. United States District Court for the Northern District of California. American Central Ins. Co. et al., Appellants, vs. David Isaacs, Appellee. Citation on Appeal. Filed Aug. 28, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

United States of America,

Southern Division of the Northern District of California,—ss.

Receipt of the within Citation on Appeal as required by law is hereby acknowledged at San Francisco, California, this 28th day of August, 1917, subject to all objections and exceptions.

BERT SCHLESINGER,
Solicitor for Appellee.

[Endorsed]: No. 3105. United States Circuit Court of Appeals for the Ninth Circuit. American Central Insurance Company, National Fire Insurance Company of Hartford, Insurance Company of North America, National Union Fire Insurance Company of Pittsburg, Pa., Security Insurance Company of New Haven, Appellants, vs. David Isaacs, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed January 2, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States District Court in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE CO. et al.,
Complainants,

vs.

DAVID ISAACS,
Defendant.

Order Enlarging Time to File Record and Docket Cause in Appellate Court Sixty Days from September 20, 1917.

GOOD CAUSE APPEARING, it is hereby ordered that the Complainants' time for filing and docketing the record in the above-entitled cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same hereby is extended sixty days from the 20th day of September, 1917.

Dated September 13th, 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 253—In Equity. United States District Court, Southern Division, Northern District of California, Second Division. American Central Insurance Co. et als., Complainants, vs. David Isaacs, Defendant. Order Enlarging Time to File and Docket Record. Filed Sep. 13, 1917. F. D. Monckton, Clerk.

In the United States District Court in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE CO. et al.,
Complainants,

vs.

DAVID ISAACS,
Defendant.

Order Enlarging Time to File Record and Docket Cause in Appellate Court to and Including December 19, 1917.

GOOD CAUSE APPEARING, it is hereby ordered that the complainants' time for filing and docketing the record in the above-entitled cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby extended to the 19th day of December, 1917, inclusive.

November 19, 1917.

WM. W. MORROW,
Judge of the U. S. Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: In Equity. No. 253. United States District Court, Southern Division, Northern District of California, Second Division. American Central Insurance Co. et als., Complainants, vs. David Isaacs, Defendant. Order Enlarging Time to File and Docket Record. Filed Nov. 26, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

AMERICAN CENTRAL INSURANCE CO. et al.,
Appellants,

vs.

DAVID ISAACS,
Appellee.

Order Enlarging Time to File Record and Docket Cause in Appellate Court to and Including January 4, 1918.

Good cause being shown, it is hereby ordered that the appellants in the above-entitled case may have to and including the 4th day of January, 1918, within which to file the record and to docket the case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 19, 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and including January 4, 1918, to File Record thereof and to Docket Case. Filed Dec. 19, 1917. F. D. Monckton, Clerk.

No. 3105. United States Circuit Court of Appeals for the Ninth Circuit. American Central Insurance Co. et al. vs. David Isaacs. Order Under Rule 16 Enlarging Time to January 4, 1918, to File Record thereof and to Docket Case. Refiled Jan. 2, 1918. F. D. Monckton, Clerk.